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Antitrust and First Amendment Implications of *Professional Real Estate Investors*

Gary Myers*

I. Introduction

The First Amendment right to petition the government for redress of grievances¹ has received relatively little attention compared to other portions of the Bill of Rights. In 1993, the Supreme Court decided an antitrust case² that dramatically changed the law of antitrust immunity for litigation, which is one form of petitioning activity. This decision has important ramifications not only for antitrust law, but also for all laws that regulate litigation behavior, such as the tort of abuse of process and Rule 11 of the Federal Rules of Civil Procedure.

An extensive amount of litigation and commentary regarding the circumstances in which lawsuits can be used as an anticompetitive weapon has developed over the last thirty years.³ As a general rule, lawsuits and other efforts to petition the government are immune from antitrust scrutiny, a principle established in two Supreme Court cases, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*⁴ and *United Mine Workers v. Pennington*.⁵ This principle—known as the *Noerr-Pennington*

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1. The Petition Clause of the First Amendment provides: "Congress shall make no law abridging the right of the people to petition the Government for a redress of grievances." U.S. CONST. amend. I. For discussion of this right, see *infra* notes 215-319 and accompanying text.

2. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920 (1993).

3. See *infra* notes 15-82 and accompanying text.

4. 365 U.S. 127 (1961).

5. 381 U.S. 657 (1965).

doctrine—states that genuine efforts to lobby the government are immune from liability under the antitrust laws, even if the petitioning efforts lead to plainly anticompetitive government actions.⁶

This immunity extends to litigation behavior, a point firmly established in *California Motor Transport Co. v Trucking Unlimited*.⁷ An antitrust plaintiff can overcome *Noerr-Pennington* immunity only by satisfying the requirements of the "sham" exception: "[T]here may be instances where the alleged conspiracy 'is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.'"⁸ In such instances, "the application of the Sherman Act would be justified."⁹ Significantly, *California Motor Transport* also expressly held that *Noerr-Pennington* immunity is based both on an interpretation of the Sherman Act and on the Petition Clause of the First Amendment.¹⁰

The issue of whether allegedly predatory litigation behavior falls under the sham exception has been heavily litigated. Finding the lower courts hopelessly divided, the Supreme Court recently decided a sham litigation case, *Professional Real Estate Investors, Inc. v Columbia Pictures Industries, Inc.*¹¹ This decision announced a new two-part test for the sham exception and provided some guidance in its application. The Court declined to impose potential antitrust liability based solely on a showing that litigation was used for predatory purposes.¹² Instead, an antitrust plaintiff must first prove that the litigation was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."¹³ After establishing this fact, the plaintiff must then prove that the litigation was brought for anticompetitive purposes.¹⁴

6. See *United Mine Workers v Pennington*, 381 U.S. 657, 669-70 (1965); *Eastern R.R. Presidents Conference v Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961).

7. 404 U.S. 508 (1972).

8. *California Motor Transp. Co. v Trucking Unlimited*, 404 U.S. 508, 511 (1972) (quoting *Noerr*, 365 U.S. at 144).

9. *Id.* (quoting *Noerr*, 365 U.S. at 144).

10. See *id.* at 510.

11. 113 S. Ct. 1920 (1993).

12. *Professional Real Estate Investors, Inc. v Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1927 (1993).

13. *Id.* at 1928.

14. *Id.*

The Court's decision raises new issues in antitrust law and leaves some important questions unresolved. Furthermore, although the opinion only addressed antitrust immunity for litigation activity, the First Amendment concerns expressed in *Professional Real Estate Investors* arguably constrain other areas of federal and state law, such as Rule 11 and the tort of abuse of process. These topics are the subject of this Article.

This Article begins with a discussion of the development of *Noerr-Pennington* immunity as it applies to litigation behavior. Parts III and IV describe the litigation in *Professional Real Estate Investors* and then analyze the effect of this new decision on predatory litigation law. Part V discusses possible ramifications of the case for other areas of federal and state law in which subjective intent is the sole keystone for the imposition of liability on petitioning activity. Because *Professional Real Estate Investors* interprets the First Amendment to preclude antitrust liability in these cases, other laws that deter bad faith litigation may no longer be valid in light of the Court's expanded view of the protected role of litigation under the Petition Clause.

II. Basic Principles of Noerr-Pennington Immunity

A. Antitrust Remedies for Predatory Litigation

It is well established that litigation and other forms of petitioning activity can be part of a firm's anticompetitive strategy. Predatory litigation can serve several possible anticompetitive functions, including eliminating or disciplining competitors, raising rivals' costs, and delaying or deterring entry into a market.¹⁵ From an economic standpoint, when a

15. For a discussion of the purposes of predatory litigation, see James D. Hurwitz, *Abuse of Government Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 68-75 (1985); Gary Myers, *Litigation as a Predatory Practice*, 80 KY. L.J. 565, 586-96 (1992). See also Michael W. Bien, *Litigation as an Antitrust Violation: Conflict Between the First Amendment and the Sherman Act*, 16 U.S.F. L. REV. 41, 43 n.5 (1981) (discussing use of litigation to raise rivals' costs, particularly financing expenses); Christopher C. Klein, *Predation in the Courts: Legal Versus Economic Analysis in Sham Litigation Cases*, 10 INT'L REV. L. & ECON. 29, 29 & n.3 (1990) (noting argument that predatory litigation rarely takes place). See generally DOUGLAS F. GREER, *INDUSTRIAL ORGANIZATION AND PUBLIC POLICY* 343-44 (1980) (discussing disciplining competitors and giving examples from various industries); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986) (discussing cost-raising strategies); Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983) (same).

Former Judge Robert H. Bork described predatory litigation as a serious threat to free competition:

litigant brings suit for one of these reasons (rather than in an effort to prevail in the courtroom), the suit is predatory and threatens competition on the merits. Although the Supreme Court has ruled that legitimate petitioning activity is beyond the scope of the Sherman Act, this immunity does not apply if an antitrust plaintiff can prove that the petitioning activity was a "sham."¹⁶

Even if the plaintiff is able to establish that the litigation constituted a sham, the defendant is not necessarily liable for an antitrust violation.¹⁷ The antitrust plaintiff must still meet the affirmative elements of the claim.¹⁸ Section 2 of the Sherman Act¹⁹ requires a two-part showing to establish the offense of monopolization: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."²⁰ If the defendant

There is, of course, no way of estimating precisely how much competition is crippled or stifled each year through the abuse of governmental processes. However, the number of cases beginning to arise in the relatively new field of litigation (as well as some practical experience with local businessmen) leads one to believe that this form of predation may be common and that the aggregate annual loss to consumers may be very large. The antitrust laws can make a major contribution both to free competition and to the integrity of administrative and judicial processes by catching up with this means of monopolization.

ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 348-49 (1978).

16. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-12 (1972); see also *supra* notes 7-10 and accompanying text.

17. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1928 (1993). Lower courts made this point clear prior to the decision in *Professional Real Estate Investors*. See, e.g., *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 851 (1st Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1247 n.7, 1259 (9th Cir. 1982) (holding that if antitrust plaintiff establishes that *Noerr* immunity does not apply, it must then establish elements of Sherman Act violation), *cert. denied*, 459 U.S. 1227 (1983).

18. *Professional Real Estate Investors*, 113 S. Ct. at 1928.

19. 15 U.S.C. § 2 (1988). Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony " *Id.*

20. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the Supreme Court adopted the following definition of predation:

The question whether [a defendant's] conduct may properly be characterized

has not attained a monopoly position, it may still be liable for attempted monopolization if the plaintiff can prove (1) a specific intent to control prices or to destroy competition, (2) anticompetitive or predatory conduct designed to achieve this goal, (3) a dangerous probability of success, and (4) antitrust injury causally linked to the violation.²¹ If the litigation involves concerted behavior by two or more competitors, it may also violate section 1 of the Sherman Act.²² Finally, predatory litigation may be an unfair trade practice in violation of section 5 of the Federal Trade Commission Act.²³

B. Early Decisions Establishing Petitioning Immunity

The landmark Supreme Court decision establishing immunity for efforts to petition the government is *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*²⁴ The plaintiffs, a group of truck operators and their trade association, filed an antitrust claim against twenty-four

as exclusionary cannot be answered by simply considering its effect on [the plaintiff]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been "attempting to exclude rivals on some basis other than efficiency," it is fair to characterize its behavior as predatory.

Id. at 605 (footnotes omitted) (quoting BORK, *supra* note 15, at 138). As in the case of attempted monopolization, the plaintiff must also prove that the violation caused antitrust injury.

21. *Rickards v. Canine Eye Registration Found., Inc.*, 783 F.2d 1329, 1335 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986); *see also Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1288 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985).

22. 15 U.S.C. § 1 (1988). Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.* For examples of predatory litigation cases under § 1 of the Sherman Act, see *United Mine Workers v. Pennington*, 381 U.S. 657, 659-69 (1965) (claims under §§ 1 and 2); *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 256 (D.C. Cir. 1981) (claim under § 1), *cert. denied*, 455 U.S. 928 (1982); *Feminist Women's Health Ctr. v. Mohammad*, 586 F.2d 530, 538-39 (5th Cir. 1978) (claims under §§ 1 and 2), *cert. denied*, 444 U.S. 924 (1979).

23. *See* 15 U.S.C. § 45 (1988). The Federal Trade Commission has brought few sham litigation cases. *See L.G. Balfour Co. v. FTC*, 442 F.2d 1, 14-16 (7th Cir. 1971); *New Eng. Motor Rate Bureau, Inc.*, No. 9170, 1989 FTC LEXIS 62, at *44-49 (Aug. 18, 1989) (involving filing of tariffs with regulatory agencies).

24. 365 U.S. 127 (1961).

railroads, a railroad trade association, and a public relations firm.²⁵ The truckers claimed that the railroad interests had conspired to restrain trade and to monopolize the long-distance freight business in violation of sections 1 and 2 of the Sherman Act.²⁶ The truckers alleged that the defendants employed a lobbying and publicity campaign to discredit the trucking industry and to encourage the passage of laws harmful to them.²⁷ According to the truckers' complaint, the sole purpose of this campaign was to destroy the trucking industry as competitors in the long-distance freight business.²⁸ The plaintiffs also claimed that the lobbying was deceptive because the railroads used the "third-party technique" by sponsoring publicity that falsely appeared to originate from independent third parties.²⁹ The district court found that the railroads had violated the Sherman Act because of the improper motivation of their lobbying efforts and the deceptive nature of the third-party technique.³⁰ A divided court of appeals affirmed.³¹

Holding that the defendants had not violated the Sherman Act, the Supreme Court unanimously reversed. The Court based its holding on two principal grounds. First, Justice Black noted that the Sherman Act—given its language and purpose—does not apply to valid exercises of governmental power.³² Thus, otherwise unlawful actions mandated by the federal government³³ and by the states³⁴ do not violate the Sherman

25. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 129 (1961).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 129-30; see Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 907, 914-18 (1990) (discussing deceptive lobbying techniques employed by railroads).

30. *Noerr*, 365 U.S. at 132-33.

31. *Id.* at 135.

32. *See id.* at 135-36.

33. *See United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 560 (1939) (stating that Secretary of Agriculture's order, issued pursuant to federal statute, does not violate Sherman Act even if order fixes prices and results in monopoly).

34. *See Parker v. Brown*, 317 U.S. 341, 350-52 (1943) (holding that state's agricultural prorate program, as valid exercise of state's legislative authority, does not violate Sherman Act). The scope of *Parker* immunity has been the subject of a number of subsequent cases. *See generally* *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Southern*

Act.³⁵ Because the Sherman Act does not reach these (often anticompetitive) governmental actions, it should not reach a private party's legitimate efforts to urge the government to take such an action.³⁶ The Sherman Act regulates business activity in the marketplace in order to prevent firms from acting anticompetitively; it does not reach lobbying or other political activities.³⁷

The Court's second rationale for its holding was a constitutional one: The Sherman Act would create serious constitutional problems if the Court interpreted it to reach the railroads' lobbying efforts.³⁸ The First Amendment's Petition Clause protects lobbying and other petitioning activities, and the Court refused to interpret the Sherman Act in a manner that would infringe upon that right.³⁹ This constitutional grounding for the *Noerr-Pennington* doctrine indicates that the recent *Professional Real Estate Investors* decision may have important implications beyond the realm of antitrust law.⁴⁰

In light of this statutory and constitutional framework, the Court found that the defendants had not violated the Sherman Act.⁴¹ Justice Black first addressed the assertion that the defendants' sole purpose in conducting their lobbying efforts was to destroy the trucking industry as a competitor in long-distance freight hauling.⁴² His unqualified rejection of this argument foreshadowed the result in *Professional Real Estate Investors*:

Motor Carriers Rate Conference, Inc. v United States, 471 U.S. 48 (1985); Hoover v Ronwin, 466 U.S. 558 (1984); California Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc., 445 U.S. 97 (1980); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). For analysis of the Court's latest discussion of the interaction between *Noerr* and *Parker*, see *infra* notes 77-82 and accompanying text.

35. See *Noerr*, 365 U.S. at 136.

36. See *id.*

37. See *id.*

38. *Id.* at 137-38.

39. See *id.* at 138. The Court in *California Motor Transport Co. v Trucking Unlimited*, 404 U.S. 508 (1972), expressly stated that *Noerr* rests on both Sherman Act and First Amendment grounds. *Id.* at 509-10. Nonetheless, commentators have debated as to whether *Noerr* is based solely on an interpretation of the Sherman Act in light of First Amendment considerations or whether Justice Black actually reached the constitutional issue. See *infra* note 261.

40. See *infra* notes 215-319 and accompanying text.

41. See *Noerr*, 365 U.S. at 138.

42. See *id.* at 138-40.

The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend on their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.⁴³

Even if the defendants' lobbying efforts were motivated solely by anticompetitive purposes,⁴⁴ their actions were immune from liability under the Sherman Act.⁴⁵ The degree to which this holding extends to other types of petitioning activity, such as litigation, was one frequently litigated issue resolved by *Professional Real Estate Investors*.⁴⁶

The next decision focusing on petitioning immunity was *United Mine Workers v Pennington*,⁴⁷ in which the United Mine Workers (UMW) retirement fund sued Phillips Brothers Coal Company (Phillips) to collect payments owed to the fund under a wage agreement.⁴⁸ Phillips counter-claimed and argued that the UMW and various large coal companies had conspired to restrain and monopolize commerce in violation of sections 1 and 2 of the Sherman Act.⁴⁹ The UMW's wage agreement allegedly had the effect of squeezing out small coal producers, such as Phillips.⁵⁰ The

43. *Id.* at 139.

44. The Court assumed that the district court's finding of anticompetitive purpose was correct, although it viewed the evidence on this point as weak. *See id.* at 138 n.18.

Noerr also rejected the argument that the defendants' use of the third-party technique rendered their actions unlawful. *See id.* at 140-42. Although the tactic was unethical and deceptive, the Sherman Act establishes a code of ethics "that condemns trade restraints, not political activity." *Id.* at 140. Justice Black therefore concluded that the use of the third-party technique as part of the defendants' lobbying efforts did not violate the Sherman Act. *Id.* at 142.

45. *See id.* at 139-40.

46. *See infra* notes 83-214 and accompanying text.

47. 381 U.S. 657 (1965).

48. *United Mine Workers v Pennington*, 381 U.S. 657, 659 (1965).

49. *Id.*

50. *See id.* at 660.

large coal companies and the UMW, acting jointly, successfully persuaded the Secretary of Labor to adopt a high minimum wage for employees of companies that sold coal to the Tennessee Valley Authority (TVA).⁵¹ They also approached TVA officials and attempted to persuade them to change the TVA's coal purchasing policies in a manner detrimental to small coal operators.⁵² The jury rendered a verdict against the UMW, and the court of appeals upheld the verdict.⁵³

After determining that the labor exemption did not apply to the agreements between the UMW and the large coal operators,⁵⁴ the Supreme Court addressed the *Noerr-Pennington* issue.⁵⁵ Justice White held that the defendants' attempt to influence the actions of executive branch and agency officials was immune under *Noerr*.⁵⁶ Reaffirming the principle that anticompetitive purpose does not vitiate the immunity, Justice White stated: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."⁵⁷ Thus, in *Pennington*, the Court once again rejected an immunity standard under which subjective intent serves as the linchpin for liability.

C. Immunity for Litigation Behavior

In *California Motor Transport Co. v. Trucking Unlimited*,⁵⁸ the Supreme Court first addressed the specific application of petitioning immunity to litigation activities. The case involved a dispute between two competing groups of trucking firms.⁵⁹ The complaint alleged that the

51. *Id.*

52. *See id.* at 660-61.

53. *Id.* at 661.

54. *See id.* at 661-69. Three Justices dissented from the opinion but concurred in the result; Justices Goldberg, Harlan, and Stewart believed that the labor exemption for collective bargaining activity protected the UMW's actions from antitrust scrutiny. *See generally id.* at 697-735 (opinion of Goldberg, J.).

55. *See id.* at 669-72.

56. *See id.* at 670.

57. *Id.* Evidence of efforts to influence public officials could be introduced to show the purpose and character of the defendants' actions. *See id.* at 670 n.3.

58. 404 U.S. 508 (1972).

59. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 509 (1972).

defendant truckers had conspired to monopolize and restrain trade by preventing and delaying the plaintiffs' efforts to obtain motor carrier operating rights.⁶⁰ The weapon used to accomplish this objective was the filing of numerous lawsuits in state and federal court, including applications for review of agency decisions, appeals, and petitions for court rehearings.⁶¹ In response, the defendants sought dismissal of the suit on the basis of *Noerr-Pennington* immunity.⁶²

Significantly for purposes of analyzing the broader implications of the *Noerr-Pennington* doctrine, the *California Motor Transport* Court's analysis began with the express statement that immunity for petitioning executive and legislative officials is based on two grounds: (1) a legislative interpretation of the Sherman Act, which regulates business activity and not political activity, and (2) a constitutional limit on the antitrust laws based on the First Amendment right to petition (and right of association).⁶³ Writing for the Court, Justice Douglas then extended the First Amendment-based *Noerr-Pennington* immunity to litigation:

We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.⁶⁴

Although litigation is generally immune from antitrust scrutiny, *California Motor Transport* reiterated "that there may be instances where the alleged conspiracy 'is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.'"⁶⁵ Justice Douglas proceeded to offer what appeared to be different guidelines for litigation immunity, which he distinguished from immunity

60. *Id.*

61. *Id.*

62. *See id.* at 511.

63. *Id.* at 510.

64. *Id.* at 510-11.

65. *Id.* at 511 (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961)).

for lobbying legislators and members of the executive branch.⁶⁶ Significantly, he focused on the subjective purposes of the defendants' litigation strategy; the complaint in *California Motor Transport* alleged that these purposes were to drive out competitors, to create barriers to entry, and to establish a monopoly.⁶⁷ Despite the holdings in *Noerr* and *Pennington*—that a defendant's anticompetitive purpose or intent would not vitiate the immunity for lobbying efforts—the Court indicated that such predatory litigation strategies were not immune from the Sherman Act.⁶⁸

Instead of establishing a general standard or test (subjective, objective, or both), the Court only provided factual illustrations of cases in which the sham exception to *Noerr-Pennington* would apply.⁶⁹ On the facts of the instant case, the complaint sufficiently alleged a sham because it alleged predatory intent combined with "access barring."⁷⁰ Rather than attempting to influence public officials, the defendant truckers allegedly "sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process. It is alleged that they 'instituted the proceedings and actions with or without probable cause, and regardless of the merits of the cases.'"⁷¹ This unethical conduct, which might be tolerated in the lobbying arena, would not be protected in the courtroom.

California Motor Transport then discussed examples of other types of conduct that would constitute a sham under *Noerr-Pennington*:⁷² perjury of witnesses, use of a fraudulently obtained patent to exclude competitors,

66. See *id.* at 511-12.

67. See *id.* at 511.

68. See *id.* at 511-12.

69. See *id.* at 512-13.

70. See *id.* at 511-12.

71. *Id.* at 512. The Court elaborated as follows:

One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring [competitors] from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

Id. at 513.

72. See *id.* at 512-13.

conspiracy with government officials,⁷³ and bribery⁷⁴ In addition to these illustrations, the Court observed that "[t]here are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."⁷⁵ Thus, the Court implied that litigation behavior is evaluated under a more demanding standard than lobbying behavior. Discussion of the sham exception in *California Motor Transport* engendered litigation regarding the role of intent, the number and type of suits required to find a sham, and the overall standard for litigation behavior.⁷⁶

73. The Supreme Court eliminated the "conspiracy" exception in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374-79 (1991). Cf. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08 (1962) (stating that conspiracy with government official to eliminate competitor may result in antitrust transgression); *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964) (stating that Sherman Act violation may be found when defendants allegedly induced attorney general to place financial institution in receivership).

74. See, e.g., *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851, 862 (9th Cir. 1965) (concluding that bribery of public official may violate § 2(c) of Clayton Act, as amended by Robinson-Patman Act). A landmark patent fraud case is *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). In *Walker Process*, a firm allegedly obtained a patent through fraudulent representations to the Patent Office and then sought to use the patent to eliminate a new competitor. See *id.* at 173-74. The Court found that the firm's patent fraud was actionable under § 2 of the Sherman Act. See *id.* at 176-77

75. *California Motor Transp.*, 404 U.S. at 513. One commentator has argued that lobbying efforts directed toward the legislative and executive branches are potentially more harmful than sham litigation. See Minda, *supra* note 29, at 930-31.

76. Shortly after *California Motor Transport*, the Court heard another petitioning immunity case. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), involved possible immunity for the filing of lawsuits by an electric power company in an alleged attempt to prevent or delay entry of new competitors. See *id.* at 368. Because the district court had refused to apply *Noerr-Pennington* immunity to litigation behavior (as opposed to lobbying efforts), the Court did not reach the immunity issue and, instead, remanded the issue for further consideration in light of *California Motor Transport*. *Id.* at 379-80. On remand, the district court found that the defendant's actions fell within the sham exception to *Noerr-Pennington*:

Upon consideration of the arguments and briefs, and upon a reconsideration of the pertinent portions of the record, I find that the repetitive use of litigation by Otter Tail was timed and designed principally to prevent the establishment of municipal electric systems and thereby to preserve defendant's monopoly I find the litigation comes within the sham exception to the *Noerr* doctrine as

D Recent Decisions and an Overview

In *City of Columbia v Omni Outdoor Advertising, Inc.*,⁷⁷ an outdoor billboard firm (Omni) sued a competitor (Columbia Outdoor Advertising) and the city of Columbia, South Carolina. Omni claimed that the city council enacted a restrictive billboard ordinance that was designed to benefit Columbia Outdoor Advertising, which dominated the local market, and to limit Omni's ability to compete.⁷⁸ A major issue in the case was whether there was a "conspiracy" exception to *Noerr-Pennington* and to its logical counterpart, state action immunity under *Parker v Brown*.⁷⁹ Noting that there is no conspiracy exception to either the state action or the petitioning immunities, Justice Scalia observed in the majority opinion that a conspiracy exception would be impractical: "Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a 'conspiracy' charge."⁸⁰ Because "*Parker* and *Noerr* generally present two faces of the same coin," Justice Scalia concluded that the same considerations mandated rejection of a conspiracy exception to *Noerr-Pennington* immunity.⁸¹

defined by the Supreme Court in *California Transport*

United States v. Otter Tail Power Co., 360 F. Supp. 451, 451-52 (D. Minn. 1973), *aff'd*, 417 U.S. 901 (1974).

77. 499 U.S. 365 (1991).

78. *City of Columbia v Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 368-69 (1991).

79. 317 U.S. 341 (1943).

80. *Omni Outdoor Advertising*, 499 U.S. at 375. A number of circuits had previously acknowledged the existence of a conspiracy exception. See, e.g., *Affiliated Capital Corp. v City of Houston*, 735 F.2d 1555, 1566-68 (5th Cir. 1984) (en banc) (acknowledging conspiracy exception to state action doctrine), *cert. denied*, 474 U.S. 1053 (1986); *Westborough Mall, Inc. v City of Cape Girardeau*, 693 F.2d 733, 746 (8th Cir. 1982) (same), *cert. denied*, 461 U.S. 945 (1983); *Federal Prescription Serv. v American Pharmaceutical Ass'n*, 663 F.2d 253, 264-65 & n.11 (D.C. Cir. 1981) (same), *cert. denied*, 455 U.S. 928 (1982); *Whitworth v. Perkins*, 559 F.2d 378, 379-81 (5th Cir. 1977) (same), *vacated sub nom. City of Impact v. Whitworth*, 435 U.S. 992, *reinstated*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

81. *Omni Outdoor Advertising*, 499 U.S. at 383. Justice Scalia's analysis is worth quotation, in part because it focuses on antitrust policy and not on constitutional considerations:

As we have described, *Parker* and *Noerr* are complementary expressions of the

Most importantly for purposes of this Article, *Omni Outdoor Advertising* discussed the sham exception:

The "sham" exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license applications of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, not one "who 'genuinely seeks to achieve his governmental result, but does so *through improper means*.'"⁸²

In light of *Noerr-Pennington* and its progeny, several principles are clear. Based on both antitrust and First Amendment considerations, legitimate attempts to petition the government, including litigation before courts and administrative bodies, are immune from the Sherman Act. Nonetheless, recognizing that not every petitioning effort is legitimate and worthy of First Amendment protection, the Court has fashioned a "sham" exception. The precise contours of the sham exception have been unclear, but the Court's most recent *Noerr-Pennington* case provided a new governing standard. Because of the constitutional underpinnings of the case, *Professional Real Estate Investors* has significant consequences both

principle that the antitrust laws regulate business, not politics. The *Noerr*-invalidating conspiracy alleged here is just the *Parker*-invalidating conspiracy viewed from the standpoint of the private-sector participants rather than the governmental participants. The same factors which make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials. And if the invalidating "conspiracy" is limited to one that involves some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws. In *Noerr* itself, where the private party "deliberately deceived the public and public officials" in its successful lobbying campaign, we said that "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned."

Id. at 383-84 (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961)).

82. *Id.* at 380 (citations omitted) (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4, 508 n.10 (1988) (quoting *Session Tank Liners, Inc. v. Joor Mfg., Inc.*, 827 F.2d 458, 465 n.5 (9th Cir. 1987), *vacated*, 487 U.S. 1213 (1988))).

for antitrust law in particular and for the regulation of lawyers and litigation practices in general.

III. Overview of the Litigation in Professional Real Estate Investors

A. Factual Setting

The litigation in *Professional Real Estate Investors, Inc. v Columbia Pictures Industries, Inc.*⁸³ began in 1983. Professional Real Estate Investors, Inc. (PRE) operated a resort hotel in Palm Springs, California called La Mancha Private Club and Villas.⁸⁴ PRE placed videodisc players in each room and assembled a collection of 200 videodiscs, which it made available for rental to guests.⁸⁵ PRE also attempted to market videodisc players to other hotels for in-room viewing.⁸⁶

Columbia Pictures Industries, Inc. and seven other major movie studios⁸⁷ (collectively, Columbia) owned the copyrights to the movies that PRE was renting to its guests.⁸⁸ Columbia also licensed Spectradyne, a cable system for in-room movie viewing.⁸⁹ Thus, PRE and Columbia were competitors in the market for in-room movie viewing.⁹⁰

Columbia sued PRE in 1983 and claimed that the resort violated its movie copyrights by renting videodiscs for in-room viewing.⁹¹ PRE filed a counterclaim, which alleged that Columbia's lawsuit was a sham under *Noerr-Pennington* and asserted unfair competition and violations of sections 1 and 2 of the Sherman Act.⁹² In order to evaluate PRE's antitrust counterclaim, it is important to begin with an assessment of Columbia's copyright suit.

83. 113 S. Ct. 1920 (1993).

84. *Professional Real Estate Investors, Inc. v Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1923 (1993).

85. *Id.* Videodisc players are similar to video cassette recorders (VCRs), except that videodisc players use large discs and offer higher quality sound and pictures than do VCRs.

86. *Id.*

87. The other studios were Embassy Pictures, Paramount Pictures Corp., Twentieth Century-Fox Film Corp., Universal City Studios, Inc., Walt Disney Productions, Warner Brothers, Inc., and CBS, Inc. *Columbia Pictures Indus., Inc. v Professional Real Estate Investors, Inc.*, 228 U.S.P.Q. (BNA) 743, 744 (C.D. Cal. 1986), *aff'd*, 866 F.2d 278 (9th Cir. 1989).

88. *Professional Real Estate Investors*, 113 S. Ct. at 1923.

89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.* at 1924.

Under federal copyright law, a copyright owner has various exclusive rights, one of which is the right to control the public performance of its works.⁹³ Under the "first sale" doctrine, however, PRE could freely sell, lease, rent, or otherwise dispose of its copies of Columbia's movies.⁹⁴ This provision would, for example, permit a movie rental store to rent movies for private viewing at customers' homes, but would not permit anyone to "perform the copyrighted work publicly."⁹⁵ Thus, if the movie rental store leased a theater, it could not open the theater to the public and permit customers to view a movie owned by Columbia; such an action would constitute a public performance, which would require Columbia's authorization. Therefore, the success of Columbia's copyright claim hinged on whether PRE's rental of videodiscs for in-room viewing constituted a public performance, rather than a private viewing by resort guests.

The district court, granting PRE's motion for summary judgment on the copyright claim, agreed that the viewing of movies in guest rooms is not a public performance of the movie.⁹⁶ Columbia appealed this ruling to the United States Court of Appeals for the Ninth Circuit, which addressed the narrow issue of whether the in-room viewing of movies was a public performance.⁹⁷ Section 101 of the Copyright Act of 1976 defines a public performance as either (1) a performance of a work "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered" or (2) a transmission of the copyrighted work to the public (such as by a cable wire).⁹⁸ Columbia argued that PRE's actions constituted a public performance under either of these clauses.⁹⁹

Columbia's argument as to the first prong of the public performance definition was plausible. The issue was unsettled, and Columbia arguably had some precedential support. Columbia largely relied on *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*,¹⁰⁰ a case in which it

93. 17 U.S.C. § 106(4) (1988).

94. *See id.* § 109(a).

95. *Id.* § 106(4).

96. *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 228 U.S.P.Q. (BNA) 743, 746 (C.D. Cal. 1986), *aff'd*, 866 F.2d 278 (9th Cir. 1989).

97. *See Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278, 279-80 (9th Cir. 1989).

98. 17 U.S.C. § 101 (1988).

99. *Professional Real Estate Investors*, 866 F.2d at 280.

100. 749 F.2d 154 (3d Cir. 1984).

successfully asserted a copyright claim against a movie rental store. In *Redd Horne*, a movie rental store had private viewing rooms on its premises; customers could rent a movie and watch it in these viewing rooms.¹⁰¹ The court held that these performances were public because anyone could come into the store, rent a movie, and watch it in one of the rooms.¹⁰² Columbia argued in *Professional Real Estate Investors* that the resort hotel rooms were analogous to the screening rooms in *Redd Horne*.¹⁰³

Distinguishing *Redd Horne* on its facts, the Ninth Circuit rejected Columbia's argument.¹⁰⁴ It noted that PRE's operation was different in nature than the one in *Redd Horne*: PRE provides "living accommodations and general hotel services, which may incidentally include the rental of videodiscs to interested guests for viewing in guest rooms. While the hotel may indeed be 'open to the public,' a guest's hotel room, once rented, is not."¹⁰⁵ The court concluded that the hotel room was equivalent to a customer's private home, rather than the screening room at issue in *Redd Horne*: "La Mancha guests do not view the videodiscs in hotel meeting rooms used for large gatherings. The movies are viewed exclusively in guest rooms, places where individuals enjoy a substantial degree of privacy, not unlike their own homes."¹⁰⁶

The Ninth Circuit also rejected Columbia's second (and much weaker) argument, which was based on the second definition of a public performance under section 101 ("transmit or otherwise communicate").¹⁰⁷ The court concluded that the videodisc rentals did not satisfy this language because the rentals did not involve broadcasting or cable transmission of the movies to the public (as is done in Spectradyne's wired cable system).¹⁰⁸

B. PRE's Antitrust Claim

The *Professional Real Estate Investors* litigation then returned to the California district court, which focused on PRE's antitrust counterclaim.¹⁰⁹

101. Columbia Pictures Indus., Inc. v Redd Horne, Inc., 749 F.2d 154, 156-57 (3d Cir. 1984).

102. See *id.* at 159.

103. See *Professional Real Estate Investors*, 866 F.2d at 280.

104. See *id.* at 281.

105. *Id.*

106. *Id.*

107. See 17 U.S.C. § 101, *Professional Real Estate Investors*, 866 F.2d at 281-82.

108. See *Professional Real Estate Investors*, 866 F.2d at 281-82.

109. See *Columbia Pictures Indus., Inc. v Professional Real Estate Investors, Inc.*,

Columbia sought and obtained summary judgment on the basis of *Noerr-Pennington* immunity.¹¹⁰ The district court found that Columbia's suit did not fall within the sham exception:

It was clear from the manner in which the case was presented that [Columbia] was seeking and expecting a favorable judgment. Although I decided against [Columbia], the case was far from easy to resolve, and it was evident from the opinion affirming my order that the Court of Appeals had trouble with it as well. I find that there was probable cause for bringing the action, regardless of whether the issue was considered a question of fact or of law.¹¹¹

The district court refused to permit PRE to obtain discovery to establish that Columbia's suit, although not baseless or frivolous, was in fact motivated by a desire to drive PRE from the in-room movie rental market.¹¹² The court relied on *Noerr*, in which the Supreme Court held with regard to lobbying that "even if the defendants' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers' business, the immunity remained."¹¹³

The Ninth Circuit affirmed on somewhat different reasoning.¹¹⁴ It cited *California Motor Transport* for the proposition that sham litigation manifests itself in two forms: either misrepresentations or "the pursuit of 'a pattern of baseless claims.'"¹¹⁵ PRE did not contend that Columbia's suit was baseless or that it involved misrepresentations; rather, PRE argued that a litigation can be sham if it is not motivated by a good faith desire to obtain relief.¹¹⁶ This view had precedential support from several circuits.¹¹⁷ Under this view, "[t]he determinative inquiry is not whether the

1990-1 Trade Cas. (CCH) ¶ 68,971, at 63,243 (C.D. Cal. 1990), *aff'd*, 944 F.2d 1525 (9th Cir. 1991), *aff'd*, 113 S. Ct. 1920 (1993).

110. *See id.*

111. *Id.*

112. *See id.*

113. *Id.* (quoting *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1251 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983)).

114. *See Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1528-32 (9th Cir. 1991), *aff'd*, 113 S. Ct. 1920 (1993).

115. *Id.* at 1529 (quoting *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)).

116. *See id.* at 1530.

117. Apparently, PRE primarily relied on *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988).

suit was won or lost, but whether it was significantly motivated by a genuine desire for judicial relief. [A] *genuine* desire for relief means that the desire for relief must be both honest and reasonable."¹¹⁸

The Ninth Circuit applied a much narrower definition of sham litigation. Under the court's standard, the antitrust plaintiff must begin by showing that the alleged sham litigation was baseless or meritless, but even this showing is not sufficient if a single lawsuit is involved: "When the antitrust plaintiff challenges one suit and not a pattern, *a finding of sham requires not only that the suit is baseless*, but also that it has other characteristics of grave abuse, such as being coupled with actions or effects external to the suit that are themselves anti-competitive."¹¹⁹

Given the Ninth Circuit's high threshold for proving sham litigation, it was clear that PRE could not prevail as a matter of law.¹²⁰ "Simply stated," the Ninth Circuit concluded, "a suit brought with probable cause does not fall within the sham exception to the *Noerr-Pennington* doctrine."¹²¹

C. The Supreme Court's Opinion

The United States Supreme Court then granted PRE's petition for certiorari,¹²² but ultimately affirmed the Ninth Circuit's ruling on the issue of whether a nonfrivolous suit can satisfy the sham exception.¹²³ After recounting the case's complex procedural history, Justice Thomas's majority opinion noted that the circuit courts were split on the issue:¹²⁴

118. *Id.* at 528-29.

119. *Professional Real Estate Investors*, 944 F.2d at 1530 (quoting *Rickards v Canine Eye Registration Found., Inc.*, 783 F.2d 1329, 1334 (9th Cir.) (quoting *Omni Resource Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984)), *cert. denied*, 479 U.S. 851 (1986)) (emphasis added by court). The Supreme Court did not endorse this demanding standard for the sham exception. *See infra* notes 122-214 and accompanying text.

120. *See Professional Real Estate Investors*, 944 F.2d at 1531. The Ninth Circuit noted that Columbia's copyright claim presented an issue of first impression and thus could not meet the baselessness requirement. *Id.*

121. *Id.* at 1532. The court then affirmed the district court's determination that PRE was not entitled to discovery on the issue of Columbia's subjective intent, which became irrelevant under the Ninth Circuit's standard. *See id.* at 1532-33.

122. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 112 S. Ct. 1557, 1557 (1992).

123. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1929 (1993).

124. The Court's opinion cited three cases that clearly disagreed with the Ninth

"The courts of appeals have defined 'sham' in inconsistent and contradictory ways. We once observed that 'sham' might become 'no more than a label courts could apply to activity they deem unworthy of antitrust immunity.' The array of definitions adopted by lower courts demonstrates that this observation was prescient."¹²⁵

The Court began its analysis of the issue by summarizing the constitutional policy behind *Noerr-Pennington* immunity—permitting parties to petition the government for redress.¹²⁶ The Court then acknowledged that *California Motor Transport* had left unresolved the issue of whether a successful lawsuit can be a sham if it is brought for anticompetitive purposes.¹²⁷ In particular, the opinion quoted several passages from *California Motor Transport* that appeared to treat subjective intent as a significant factor in assessing immunity; the Court dismissed this language on the ground that although anticompetitive intent might be a necessary condition for antitrust liability, it was not a sufficient condition.¹²⁸

Justice Thomas noted that *Noerr* refused to deem lobbying efforts as sham even if the sole purpose of the lobbying was to destroy competitors.¹²⁹ Contrary to the view expressed by some lower courts and commentators,¹³⁰

Circuit's view and seven cases that were consistent with that view. See *id.* at 1925 n.3 (citing cases). For commentary on the standards for sham litigation, see BORK, *supra* note 15, at 347 ("Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition. Antitrust law is beginning to catch up with it, but the criteria that are to govern this field are not yet fully formulated."); Myers, *supra* note 15, at 608-30 (discussing division among lower courts and proposing cost-benefit standard for predatory litigation). Gary Minda notes:

[T]he current state of the [*Noerr-Pennington*] doctrine has been characterized as "uncertain," "inconsistent," "disintegrating," and an antitrust "quagmire." The Supreme Court's case-by-case approach to this important area of antitrust law has been unfruitful because adjudication has failed to raise, let alone resolve, serious analytical difficulties at the core of the *Noerr-Pennington* doctrine.

Minda, *supra* note 29, at 910 (footnote omitted).

125. *Professional Real Estate Investors*, 113 S. Ct. at 1925 (footnote omitted) (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 n.10 (1988)).

126. See *id.* at 1926.

127. See *id.* (discussing *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-12 (1972)).

128. See *id.* at 1926 n.4 (discussing *California Motor Transp.*, 404 U.S. at 512, 515).

129. See *id.* at 1926-27 (discussing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-39, 143 (1961)).

130. See *infra* note 186 and accompanying text (discussing predatory use of litigation).

Justice Thomas found that *California Motor Transport* and later decisions did not retreat from this position, at least in the context of litigation behavior.¹³¹ He then endorsed a broad proposition: that motive, as a basis for either imposing or escaping liability, generally is not a determinative factor in antitrust analysis.¹³² The majority opinion concluded its rejection of a purely subjective standard by noting that such a standard would not provide "real 'intelligible guidance.'"¹³³

The Court then established a strict, two-part definition of sham litigation that contains both an objective and a subjective prong.¹³⁴ The antitrust plaintiff must first prove that the lawsuit was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."¹³⁵ Second, the plaintiff must show that "the baseless lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor,' through the 'use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.'"¹³⁶ The Court described the second prong of its test as a subjective one that focuses on the economic viability of the litigation as a weapon in the marketplace.¹³⁷

Applying its standard to the instant case, the Court found that PRE could not show that Columbia's copyright claim was objectively unreasonable.¹³⁸ "The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation."¹³⁹ The Court noted that Columbia had probable cause as a matter of law, given the disagreement among the circuits regarding whether

131. See *Professional Real Estate Investors*, 113 S. Ct. at 1927

132. See *id.* at 1927-28 (discussing numerous cases downplaying importance of competitor's subjective intent).

133. *Id.* at 1928 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 n.10 (1988)).

134. See *id.*

135. *Id.* The Court observed that a successful suit is, by definition, not baseless. See *id.* at 1928 n.5. Moreover, even an unsuccessful suit may have been reasonably grounded in law and fact when it was initiated. See *id.*

136. *Id.* at 1928 (citation omitted) (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961), and *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991)) (first emphasis added by court).

137. See *id.* The Court then noted that an antitrust plaintiff that meets the two-part test overcomes *Noerr-Pennington* immunity, but must still prove a substantive antitrust violation. *Id.* This point is consistent with long-established law. See *supra* note 17

138. See *Professional Real Estate Investors*, 113 S. Ct. at 1929-31.

139. *Id.* at 1929.

and in what circumstances in-room playing of copyrighted works constitutes a public performance.¹⁴⁰ "Columbia might have won its copyright suit in either the Third or the Seventh Circuit. Even in the absence of supporting authority, Columbia would have been entitled to press a novel copyright claim as long as a similarly situated reasonable litigant could have perceived some likelihood of success."¹⁴¹ Justice Thomas concluded that because Columbia had probable cause to institute its copyright suit, PRE was not entitled to discovery as to Columbia's subjective intent, and Columbia was immune from PRE's antitrust claims as a matter of law.¹⁴²

D The Concurring Opinions

There were two concurring opinions in *Professional Real Estate Investors*: one by Justice Souter, who joined the majority opinion with additional comments, and one by Justice Stevens, who concurred only in the judgment and wrote separately.¹⁴³

Justice Souter sought to clarify the majority's use of the term "probable cause," which had also been used by the lower courts.¹⁴⁴ He noted that the Court had announced its own test, which focused on whether "a reasonable litigant could realistically have expected success on the merits,"¹⁴⁵ and suggested that the reference to "probable cause" was not meant to alter the standard that the Court had just pronounced.¹⁴⁶

Justice Stevens, joined by Justice O'Connor, expressly declined to join the majority opinion and concurred only in the result.¹⁴⁷ Justice Stevens agreed with the majority that an objective standard is appropriate for assessing whether a firm's litigation behavior is sham and that Columbia's suit was not sham.¹⁴⁸ He expressed concern, however, with the Court's

140. See *id.* at 1930. Indeed, the Court noted that the Ninth Circuit's finding against Columbia had been criticized by other circuits and by commentators. See *id.*

141. *Id.* at 1931.

142. See *id.*

143. See *id.* at 1931-32 (Souter, J., concurring); *id.* at 1932-36 (Stevens, J., concurring in judgment).

144. See *id.* at 1931-32 (Souter, J., concurring).

145. *Id.* at 1931.

146. See *id.* at 1931-32. Justice Souter also noted that the majority's references to tort and Rule 11 remedies for baseless suits should not be read to import the rules in these areas of law into the *Noerr-Pennington* arena. See *id.* at 1932.

147. See *id.* at 1932, 1936 (Stevens, J., concurring in judgment).

148. See *id.* at 1932-33.

definition of the sham standard.¹⁴⁹ Under the majority's standard, the litigation is immune if a "reasonable litigant could realistically expect success on the merits."¹⁵⁰ Justice Stevens stated: "There might well be lawsuits that fit [this] definition but can be shown to be objectively *unreasonable*, and thus shams. It might not be objectively reasonable to bring a lawsuit just because some form of success on the merits—no matter how insignificant—could be expected."¹⁵¹ Justice Stevens noted that Columbia's copyright claim against PRE was clearly well grounded and thus constituted a clear case of immune petitioning activity.¹⁵² He concluded: "I would not, however, use this easy case as a vehicle for announcing a rule that may govern the decision of difficult cases, some of which may involve abuse of the judicial process."¹⁵³

IV *Evaluating the Professional Real Estate Investors Test*

The Supreme Court's opinion in *Professional Real Estate Investors* laid to rest some unresolved issues in cases alleging predatory litigation. The Court announced a two-part test that the antitrust plaintiff must satisfy in order to overcome *Noerr-Pennington* immunity: (1) that a reasonable litigant could not realistically expect success on the merits and (2) that the litigation is being used to attain economic objectives.¹⁵⁴ If the lawsuit or lawsuits in question involve situations in which a "reasonable litigant could realistically expect success on the merits,"¹⁵⁵ then *Noerr-Pennington* immunity applies, regardless of the litigant's subjective purpose.¹⁵⁶

Nonetheless, the *Professional Real Estate Investors* decision leaves a number of other important issues unresolved. Moreover, the two-part standard is problematic in several respects. This section of the Article will address these issues.

149. *See id.*

150. *Id.* at 1932 (quoting majority opinion, *id.* at 1928).

151. *Id.* Justice Stevens questioned whether a lawsuit that involved 10 years of litigation and two appeals to collect one dollar from the defendant would be immune under the majority's standard. *See id.* at 1932 n.2 (citing *Farrar v. Hobby*, 113 S. Ct. 566, 575 (1992) (O'Connor, J., concurring) (involving civil rights suit in which plaintiff recovered one dollar from one of six defendants after 10 years of litigation and two appeals)).

152. *See id.* at 1933.

153. *Id.* at 1936.

154. *See id.* at 1928.

155. *Id.*

156. *See id.*

A. Vagueness of the Majority's Two-Part Test

The Supreme Court's announcement of the two-part test was somewhat clouded by its discussion and application of that test. All of the Justices agreed that the standard should be one of objective reasonableness.¹⁵⁷ Yet the majority defined and described the objective prong of the standard in several different ways. First, Justice Thomas stated that the standard depends on whether there was an "objectively reasonable effort to litigate."¹⁵⁸ Next, he described the issue as whether the litigation "constitute[s] the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief";¹⁵⁹ then he referred to whether the suit is "objectively baseless" and whether "probable cause" exists.¹⁶⁰ Finally, he applied the standard and, citing the language of Rule 11, concluded that "Columbia's copyright action was arguably 'warranted by existing law'."¹⁶¹

Both Justice Souter and Justice Stevens questioned the majority's discussion of the objective standard.¹⁶² Justice Souter's concern was that the reference to other language, such as "probable cause" and the Rule 11 standard, should not blur the actual standard that the Court announced, even though the majority seemed to treat the terms as interchangeable.¹⁶³ Justice Stevens's disagreement with the majority was much more fundamental and pronounced, but he also questioned the majority's use of terminology.¹⁶⁴ The use of terms of art, such as "objectively baseless,"

157. See *id.* at 1926; *id.* at 1931 (Souter, J., concurring); *id.* at 1932 (Stevens, J., concurring in judgment).

158. *Id.* at 1926.

159. *Id.* at 1929.

160. *Id.* at 1928, 1929.

161. *Id.* at 1930 (quoting FED. R. CIV. P. 11). The Rule 11 standard is often referred to as a "frivolousness" standard. See, e.g., *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1122 (7th Cir. 1992); *Magnus Elecs., Inc. v. Masco Corp.*, 871 F.2d 626, 629 (7th Cir.), *cert. denied*, 493 U.S. 891 (1989); *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1159 (9th Cir. 1987); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1085 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988); *Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff*, 638 F. Supp. 714, 725-26 (S.D.N.Y. 1986).

162. See *Professional Real Estate Investors*, 113 S. Ct. at 1931-32 (Souter, J., concurring); *id.* at 1932 & n.1 (Stevens, J., concurring in judgment).

163. See *id.* at 1931-32 (Souter, J., concurring); *infra* notes 289-305 and accompanying text (discussing Rule 11 standard).

164. See *Professional Real Estate Investors*, 113 S. Ct. at 1932 & n.1 (Stevens, J., concurring in judgment) (quoting various versions of Court's standard).

"probable cause," and "warranted by existing law," creates ambiguity as to the meaning of the first prong of the Court's definition of the sham exception. Presumably, a lawsuit that is baseless, that lacks probable cause,¹⁶⁵ or that is unwarranted by existing law (or, possibly, a nonfrivolous argument for changing the law)¹⁶⁶ could fall within the sham exception to *Noerr-Pennington*.

What is therefore left unclear is whether the lawsuit *must* be frivolous in one or more of these ways in order to fail the Court's announced test—whether a "reasonable litigant could realistically expect success on the merits."¹⁶⁷ A party can reasonably expect to lose a lawsuit even though the suit is not entirely frivolous. Thus, an antitrust plaintiff might be able to prove sham litigation under the Court's standard without demonstrating that the suit was frivolous. Even under the standard presented in the majority opinion in *Professional Real Estate Investors*, the plaintiff should only be required to show that the lawsuit in question was *unreasonable*—in other words, that it was not reasonably expected to be successful.

Application of such a standard to the facts of *Professional Real Estate Investors* indicates that Columbia's copyright claim against PRE was reasonable. Indeed, the suit had a substantial chance of success. In the Supreme Court's own evaluation of Columbia's copyright suit, it noted

165. The term "probable cause" is used, *inter alia*, in the law of malicious prosecution. See W PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 119, at 871, 876-82, § 120, at 893-94 (5th ed. 1984) [hereinafter PROSSER & KEETON] (discussing element of "probable cause" in malicious prosecution actions). The term itself has several differing meanings; some courts and the *Restatement (Second) of Torts*, for instance, require that the party instituting the proceeding have a subjective belief in the validity of the claim or charge. PROSSER & KEETON, *supra*, § 119, at 877 (citing cases and RESTATEMENT (SECOND) OF TORTS § 662, cmt. c (1977)). Most courts, however, apply an objective standard. *Id.* at 876-77

166. See FED. R. CIV P 11. Rule 11 states in relevant part:

By presenting to the court a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after inquiry reasonable under the circumstances, the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law

FED. R. CIV P 11(b)(2) (emphasis added). An extensive body of cases and literature has developed concerning the meaning of this, as well as prior, Rule 11 terminology. See generally *infra* notes 289-305 and accompanying text.

167. *Professional Real Estate Investors*, 113 S. Ct. at 1928.

that the movie studio might have *prevailed* under the law in the Third and Seventh Circuits.¹⁶⁸ Thus, the suit was far from frivolous; it was in fact reasonable to expect that it might be successful. Under a broad reasonableness standard, Columbia's suit would be immune. It was unnecessary for the Court to evaluate whether Columbia's suit was baseless. If baselessness were the standard, Columbia could arguably bring suit in the Ninth Circuit even if the Third and Seventh Circuits' rulings went squarely against it; Columbia could argue that it justifiably sought a different rule in the Ninth Circuit, even though the objective likelihood of that result was slim.

Several recent lower court decisions have applied the *Professional Real Estate Investors* standard. Most of these decisions have assumed that an antitrust plaintiff can establish the sham exception only by proving that the defendant's lawsuit was baseless, as if any suit that is not completely baseless is necessarily reasonable. For example, in *Carroll Touch, Inc. v. Electro Mechanical Systems, Inc.*,¹⁶⁹ Carroll Touch, Inc. (Carroll Touch) claimed that Electro Mechanical Systems, Inc. (EMS) had infringed its patent on a device that permits computer users to enter commands by touching the computer screen.¹⁷⁰ Counterclaiming, EMS alleged that the patent suit was predatory and in violation of antitrust and unfair competition law.¹⁷¹ Specifically, EMS argued that Carroll Touch brought the patent claim in order to gain trade secret information, to harm EMS as a competitor, and to deter potential entrants into the market.¹⁷²

Applying *Professional Real Estate Investors*, the United States Court of Appeals for the Federal Circuit held that *Noerr-Pennington* immunity applied.¹⁷³ Even though the patent suit was rejected as a matter of law, the court held that EMS failed to establish that Carroll Touch's lawsuit fell within the sham exception.¹⁷⁴ Because EMS could not prove that the patent claim was "objectively baseless or frivolous," the court held that the patent suit was immune under *Noerr-Pennington* as a matter of law.¹⁷⁵

168. *Id.* at 1931.

169. 15 F.3d 1573 (Fed. Cir. 1993).

170. *See Carroll Touch, Inc. v. Electro Mechanical Sys., Inc.*, 15 F.3d 1573, 1575-76 (Fed. Cir. 1993).

171. *Id.* at 1576.

172. *Id.* at 1582.

173. *See id.* at 1582-83.

174. *See id.* at 1583.

175. *Id.*

Another post-*Professional Real Estate Investors* appellate decision interpreting the two-part test is *Liberty Lake Investments, Inc. v Magnuson*.¹⁷⁶ In that case, a shopping center owner mounted environmental law challenges to a proposed new shopping development.¹⁷⁷ All of the environmental claims were rejected by the courts and agencies involved,¹⁷⁸ and the Ninth Circuit acknowledged that the claims lacked "overwhelming strength,"¹⁷⁹ which appears to be something of an understatement. The Ninth Circuit expressly indicated that the sham standard required a showing "that a lawsuit is baseless and that the suit was brought as part of an anticompetitive plan external to the underlying litigation."¹⁸⁰

A number of other cases have explicitly described the first prong of the *Professional Real Estate Investors* test as a requirement that the allegedly predatory litigation be baseless or frivolous.¹⁸¹ Similarly, most practitioner commentary on *Professional Real Estate Investors* has emphasized the Court's discussion of baselessness in reaching its result.¹⁸²

176. 12 F.3d 155 (9th Cir. 1993).

177. See *Liberty Lake Invs., Inc. v. Magnuson*, 12 F.3d 155, 156 (9th Cir. 1993), cert. denied, 115 S. Ct. 77 (1994).

178. See *id.*

179. *Id.* at 158.

180. *Id.* at 157

181. See, e.g., *El Cajon Cinemas, Inc. v American Multi-Cinema, Inc.*, 832 F Supp. 1395, 1398 (S.D. Cal. 1993) (noting that antitrust plaintiff must prove that litigation "constituted the pursuit of a baseless claim"); *Whelan v Abell*, 827 F Supp. 801, 803-04 (D.D.C. 1993) (applying *Professional Real Estate Investors* standard to state tort claims and requiring proof that claim was "objectively baseless"), *dismissed*, 1993 WL 410900 (D.C. Cir. Oct. 6, 1993); see also *Harris Custom Builders, Inc. v Hoffmeyer*, 834 F Supp. 256, 261 (N.D. Ill. 1993) (stating that first prong requires "baseless lawsuit"). The district court in *Hoffmeyer* imposed Rule 11 sanctions against Hoffmeyer for bringing antitrust and other federal counterclaims; hence, Hoffmeyer's claim of predatory litigation was itself found to be frivolous. *Id.* at 263. *Hoffmeyer* was actually a fairly clear case of immune petitioning activity. The plaintiff's copyright claim had survived two motions for summary judgment: "An action that is well enough grounded, factually and legally, to survive a motion for summary judgment is sufficiently meritorious to lead a reasonable litigant to conclude that they had some chance of success on the merits." *Id.* at 261-62.

182. See generally *Antitrust Immunity for Filing Suit—Supreme Court Narrowly Defines "Sham,"* 8 FED. LITIGATOR 166 (1993) (discussing majority's standard and views of concurring Justices); Leonard M. Niehoff, *The "Sham" Exception to Noerr-Pennington*, 72 MICH. B.J. 708 (1993) (referring to "probable cause" standard); *Supreme Court Provides New Two-Part Definition of Antitrust "Sham,"* COMPUTER LAW., June 1993, at 34 (referring to "probable cause" standard).

The second prong of the majority's definition of sham litigation focuses on the economic viability of the alleged predatory litigation, which the antitrust plaintiff must also prove:

[T]he court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability. Of course, even a plaintiff who defeats the defendant's claim to *Noerr* immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation.¹⁸³

Thus, the second prong of the *Professional Real Estate Investors* test involves what the Court calls a "subjective" element, which considers whether the litigation was used as an economic weapon.¹⁸⁴ It would seem that almost any litigation behavior that fails the first prong of the *Professional Real Estate Investors* test would at least arguably fail the second prong as well. In other words, if the litigation behavior was objectively unreasonable, it must have been initiated or maintained for anticompetitive or other improper purposes. Given that the antitrust plaintiff will have to prove a substantive antitrust violation in order to prevail, that party should always be able to claim that it proved the second prong of the sham exception. In short, given the strict requirement under the first prong of the Court's test, the second prong seems redundant.

B. The Narrow Definition of Unreasonableness

As discussed in the previous subpart, many courts have interpreted and will interpret *Professional Real Estate Investors* to require that the antitrust plaintiff prove that the challenged litigation was baseless or frivolous in order to invoke the sham exception. This definition of unreasonableness is overly narrow because it unnecessarily permits the use of litigation as an anticompetitive tool.

The difficulty with the narrow definition of sham litigation is best illustrated by a hypothetical case illustration. Although this particular

183. *Professional Real Estate Investors*, 113 S. Ct. at 1928 (citations omitted) (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961), and *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991)) (first emphasis added by court).

184. *See id.*

example is fictional, there are many cases that involve similar facts.¹⁸⁵ Assume that Megadata is a large firm in the computer industry; the firm holds a substantial share of the market, has market power, and enjoys the fruits of proprietary technology protected under patent, copyright, and trade secret law. Megadata wishes to exclude competition in its markets, but recognizes that some predatory practices would be readily challenged by present and potential competitors. Thus, for example, if Megadata engaged in predatory pricing, its actions would be detected and could be proven in court using cost data. Instead, Megadata sues actual or potential competitors and alleges, for instance, that they violated patents or copyrights.

The likelihood that Megadata's intellectual property claims would succeed in court is small, although the likelihood is high enough that Megadata's suits could not be labeled as baseless or frivolous. Perhaps Megadata has a ten percent chance of success on the merits because it is unlikely that Megadata's patent or copyright was infringed. If it is successful, it can collect damages, costs, and possibly attorneys fees having a total present value of \$250,000; thus, the expected value of the litigation is \$25,000 (\$250,000 discounted for the ten percent chance of prevailing). If Megadata loses, it will spend \$50,000 on litigation expenses. Megadata would typically conclude that the expected recovery from the litigation would not justify the ninety percent probability that the suit will fail and that it will bear substantial litigation costs.¹⁸⁶

185. For examples of the predatory use of intellectual property claims, see *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 851 (1st Cir. 1985) (involving trade secret claims), *cert. denied*, 475 U.S. 1016 (1986); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471 (7th Cir. 1982) (same), *cert. denied*, 461 U.S. 958 (1983); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 988-89 (9th Cir. 1979) (involving patent infringement claims), *cert. denied*, 444 U.S. 1025 (1980). See also *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) (involving use of fraudulently obtained patent to eliminate competitor). Other cases involve misuse of regulatory challenges. See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 368 (1973) (electric utility monopoly used litigation to deter entry of competitors); *Liberty Lake Invs., Inc. v. Magnuson*, 12 F.3d 155, 156-58 (9th Cir. 1993) (shopping center owner sponsored weak environmental lawsuits against potential competitor), *cert. denied*, 115 S. Ct. 77 (1994); *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 789 (2d Cir. 1983) (telephone company used regulatory challenges to eliminate competitor), *cert. denied*, 464 U.S. 1073 (1984).

186. This example is based on an economic analysis of predatory litigation. See *Professional Real Estate Investors*, 113 S. Ct. at 1935-36 (Stevens, J., concurring in judgment) (discussing use of litigation to obtain economic objectives); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982) (Posner, J.) (same), *cert. denied*, 461 U.S. 958 (1983); Myers, *supra* note 15, at 602-06 (same); see also Klein, *supra* note 15, at 29 ("The case law frequently defines sham litigation as anticompetitive litigation

On these facts, Megadata would not be acting as a reasonable litigant if it brought the lawsuit against its actual or potential competitors. In other words, if the only benefits accruing to Megadata were from the favorable outcome in litigation, then the lawsuit's costs exceed its benefits. If, on the other hand, the lawsuit would generate collateral or outside benefits, then Megadata might bring the lawsuit. These additional benefits make litigation an anticompetitive weapon. The threat or use of litigation may delay or deter new entry and may thereby permit Megadata to continue to earn monopolistic profits. When litigation is used in this manner, it should not be cloaked in *Noerr-Pennington* immunity. To quote *Professional Real Estate Investors*, Megadata would be using litigation "to interfere directly with the business relationships of a competitor,' through the 'use [of] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.'"¹⁸⁷

Whether Megadata's actions would be immune depends on an interpretation of the *Professional Real Estate Investors* two-part test. Applying the Court's test, Megadata's target could claim (1) that given the ten percent chance of prevailing on the patent or copyright claim, a reasonable litigant could not realistically expect to succeed on the merits and (2) that Megadata is using the litigation to achieve collateral, improper, and anticompetitive goals.

In response, Megadata, focusing on whether its claim was baseless, could rely on language in *Professional Real Estate Investors* that notes that "[t]he existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation."¹⁸⁸ Given that it had "some likelihood of success,"¹⁸⁹ albeit only ten percent, Megadata is arguably immune. If this language is viewed as part of the Court's holding, then Megadata will prevail in the antitrust suit. This ambiguity is the central unresolved issue in Justice Thomas's majority opinion, and it is a major concern of Justice Stevens in his separate concurrence.¹⁹⁰

that is either 'baseless' or fraudulent, whereas economic analysis emphasizes the anti-competitive goals that motivate the use of government processes to attack rivals.").

187. *Professional Real Estate Investors*, 113 S. Ct. at 1928 (citation omitted) (quoting *Noerr*, 365 U.S. at 144, and *Omni Outdoor Advertising*, 499 U.S. at 380) (first emphasis added by court).

188. *Id.* at 1929

189. *Id.* at 1931.

190. See *id.* at 1932-33 (Stevens, J., concurring in judgment).

This issue will probably arise frequently. In light of *Professional Real Estate Investors*, it is unlikely that an antitrust plaintiff would challenge a large firm's litigation if that firm has a strong claim, even one that ultimately fails. *Professional Real Estate Investors* itself seems like such a case. At the other extreme, if the litigation is baseless, then the plaintiff can very likely meet the first and second prongs of the sham exception. Yet much allegedly predatory litigation will fall into the intermediate category—weak, but not wholly baseless,¹⁹¹ claims that can serve as economic tools for large firms seeking to harm competitors.

C. Other Unresolved Issues

1. Litigation Fraud

Although the Court in *Professional Real Estate Investors* announced a two-part test for litigation behavior generally, it expressly did not deal with situations involving litigation fraud or other unethical conduct.¹⁹² Justice Thomas's opinion quoted language from *California Motor Transport* regarding "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations."¹⁹³ He then declined to address these cases: "We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations."¹⁹⁴

Fraud or misrepresentations committed during or in connection with litigation should be treated under a separate analysis. Often these cases arise in connection with patent applications that have allegedly been obtained through fraud or misrepresentations. Because many patent proceedings are *ex parte*, applicants are able to obtain patents while misstating or failing to disclose material information. The Supreme Court addressed such a situation in *Walker Process Equipment, Inc. v Food Machinery & Chemical Corp.*¹⁹⁵ In that case, Food Machinery & Chemical Corp. (Food Machinery) secured a patent on a sewage treatment system, which it threatened to enforce against a competitor, Walker Process

191. See *supra* notes 185-86 and accompanying text.

192. See *Professional Real Estate Investors*, 113 S. Ct. at 1929 n.6.

193. *Id.* (quoting *California Motor Transp. Co. v Trucking Unlimited*, 404 U.S. 508, 513 (1972)).

194. *Id.*

195. 382 U.S. 172 (1965).

Equipment, Inc. (Walker).¹⁹⁶ Food Machinery sued Walker for patent infringement when Walker entered the market; Walker counterclaimed and asserted that Food Machinery was attempting to monopolize the market.¹⁹⁷

Walker claimed that the patent was obtained fraudulently because Food Machinery had attested that the invention had not been in public use for more than one year before the patent application was filed, when in fact it had been publicly used for more than one year.¹⁹⁸ The Supreme Court held that Walker properly stated an antitrust claim under section 2 of the Sherman Act.¹⁹⁹

In *Professional Real Estate Investors*, the Court favorably cited *Walker Process*, as well as language in *California Motor Transport* that suggests a strict stance against litigation fraud: "[M]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."²⁰⁰ Thus, if an antitrust plaintiff has a factual basis for asserting that misrepresentations were used as part of a predatory litigation strategy, the plaintiff may be able to avoid application of the two-part sham test announced in *Professional Real Estate Investors*.

2. The Single "Sham" Lawsuit

An issue that has been heavily litigated in the lower courts is whether a single lawsuit can satisfy the sham exception. Much of the confusion on this issue stemmed from the Supreme Court's discussion of the sham

196. See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 173 (1965).

197. See *id.* at 173-74.

198. See *id.* at 174.

199. See *id.* at 176-77. Walker could prevail by showing that the patent was obtained by intentional fraud and then establishing the elements of a monopolization claim. See *id.* at 177.

200. *Professional Real Estate Investors*, 113 S. Ct. at 1929 n.6 (quoting *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972), and citing *Walker Process*, 382 U.S. at 176-77). See generally *Liberty Lake Invs., Inc. v. Magnuson*, 12 F.3d 155, 158-60 (9th Cir. 1993) (discussing litigation fraud in context of dispute between two competing shopping center developers), *cert. denied*, 115 S. Ct. 77 (1994). The Ninth Circuit in *Magnuson* recognized that the two-part test would be inapplicable if the antitrust plaintiff could prove that "a party's knowing fraud upon, or its misrepresentations to, the court deprive[d] the litigation of its legitimacy." *Id.* at 159. The *Magnuson* court found no evidence of fraud on the particular facts presented to it. *Id.* at 159-60; see also *TRW Fin. Sys., Inc. v. Unisys Corp.*, 835 F. Supp. 994, 1013-14 (E.D. Mich. 1993) (recognizing fraud exception and finding no evidence of fraud on facts presented).

exception in *California Motor Transport*. In that case, the Court stated: "One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused."²⁰¹ This reference to a pattern of claims appears to be an illustration of one form of sham litigation, along with perjury, patent fraud, and bribery.²⁰²

Most lower courts and commentators have recognized that a single lawsuit could fall within the sham exception.²⁰³ Other courts, however, have concluded that one lawsuit generally cannot constitute a sham.²⁰⁴ The

201. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

202. *See id.* at 512-13.

203. *See Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 903 (9th Cir. 1983); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1154-55 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Energy Conservation, Inc. v. Heliodyne, Inc.*, 698 F.2d 386, 388 (9th Cir. 1983); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1254-57 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *Feminist Women's Health Ctr. v. Mohammad*, 586 F.2d 530, 543 n.6 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); *First Nat'l Bank v. Marquette Nat'l Bank*, 482 F. Supp. 514, 520 (D. Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981); *see also Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1369 n.37 (5th Cir. 1983). For commentary, *see* Thomas A. Balmer, *Sham Litigation and the Antitrust Laws*, 29 BUFF. L. REV. 39, 55-56 (1980); Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 109-10 (1977); Hurwitz, *supra* note 15, at 101 & n.161 (citing several commentators); Myers, *supra* note 15, at 619-24.

204. *See Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 650 (7th Cir. 1983) (holding that pattern of baseless, repetitive claims is required under *California Motor Transport*); *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 (10th Cir. 1982) ("A sham action is something more than an action instituted without probable cause."); *Huron Valley Hosp., Inc. v. City of Pontiac*, 612 F. Supp. 654, 663 (E.D. Mich. 1985) (holding that single suit would be insufficient), *aff'd in part and dismissed in part*, 792 F.2d 563 (6th Cir.), *cert. denied*, 479 U.S. 885 (1986); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 462 F. Supp. 1072, 1103 (N.D. Ill.), *aff'd*, 594 F.2d 594 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *Mountain Grove Cemetery Ass'n v. Norwalk Vault Co.*, 428 F. Supp. 951, 955-56 (D. Conn. 1977); *Central Bank v. Clayton Bank*, 424 F. Supp. 163, 167 (E.D. Mo. 1976), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910 (1977); *see also Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 487 (8th Cir. 1985) (holding that single suit does not fall within sham exception absent evidence of access barring, i.e., ethical misconduct); *Omni Resource Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414-15 (9th Cir. 1984) (requiring showing of pattern of litigation or grave misconduct); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 996 (9th Cir. 1979) (requiring pattern of baseless litigation and access barring), *cert. denied*, 444 U.S. 1025 (1980); *First*

confusion arose because of Justice Douglas's reference to a "pattern of baseless claims" as an example of unlawful activity in *California Motor Transport*.²⁰⁵ In *Hydro-Tech Corp. v Sundstrand Corp.*,²⁰⁶ for instance, the plaintiff's antitrust claim was based on Sundstrand's unsuccessful trade secret claim against it.²⁰⁷ The plaintiff contended that the trade secret suit lacked probable cause and was brought for the purpose of interfering with its business in order to maintain Sundstrand's monopoly.²⁰⁸ The United States Court of Appeals for the Tenth Circuit held that "sham litigation" involves a gross abuse of process, which requires *more* than the filing of a baseless lawsuit with anticompetitive intent.²⁰⁹ The court indicated that the antitrust plaintiff must show "a pattern of baseless actions [or] bribery, perjury, denial of access to the courts, or the like, as those several matters are referred to in *California Motor Transport*."²¹⁰

In light of *Professional Real Estate Investors*, it is clear that the plaintiff in cases such as *Hydro-Tech* would be able to state a claim. Having alleged that the litigation lacked merit and was brought for anticompetitive purposes, the plaintiff in that case and cases like it²¹¹ would satisfy the new two-part test for sham litigation. The Court in *Professional Real Estate Investors*, although not stating the point expressly,

Nat'l Bank v. Marquette Nat'l Bank, 482 F. Supp. 514, 521 (D. Minn. 1979) (holding that absent evidence of ethical misconduct—perjury, fraud, or bribery—single suit is not sham), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981).

205. *California Motor Transp.*, 404 U.S. at 513.

206. 673 F.2d 1171 (10th Cir. 1982).

207. *Hydro-Tech Corp. v Sundstrand Corp.*, 673 F.2d 1171, 1174 (10th Cir. 1982).

208. *Id.* at 1174-75.

209. *See id.* at 1176 & n.6.

210. *Id.* at 1175.

211. Previous decisions from other courts have required a showing of improper acts, such as bribery or perjury, but *Professional Real Estate Investors* clearly does not require such a showing. *See* *Ad Visor, Inc. v Pacific Tel. & Tel. Co.*, 640 F.2d 1107, 1109 (9th Cir. 1981) (observing that establishment of sham requires proof of "improper interference with administrative or judicial process"); *First Nat'l Bank v Marquette Nat'l Bank*, 482 F. Supp. 514, 521 (D. Minn. 1979) ("[T]he institution of a single lawsuit without any allegations that the lawsuit involves ethical misconduct similar to the abuses described in *California Transport* is not sufficient to bring the defendants' actions within the 'sham exception' to the *Noerr-Pennington* doctrine."), *aff'd* 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981); *Mountain Grove Cemetery Ass'n v Norwalk Vault Co.*, 428 F. Supp. 951, 954-56 (D. Conn. 1977) (discussing need for showing of "corrupt" practices).

clearly recognized that one suit can satisfy the sham exception. Nothing in its two-part test refers to a requirement of a pattern of lawsuits or multiple claims.²¹²

Another line of now-questionable cases relied on Justice Douglas's language in *California Motor Transport* to require a showing that the challenged actions constituted "access barring"—that is, depriving the target of meaningful access to a tribunal or agency.²¹³ The Court in *Professional Real Estate Investors* did not directly raise the issue; again, its newly announced standard and its analysis do not discuss access barring.²¹⁴

Thus, the Court seems to have resolved some of the ambiguities that have existed in the law since the *California Motor Transport* decision. If an antitrust plaintiff can establish that the defendant used one or more objectively unreasonable lawsuits for anticompetitive purposes, the requirements of the sham exception are satisfied; the plaintiff can then seek to prove the elements of a substantive antitrust violation. The plaintiff is not required to prove that multiple predatory lawsuits were

212. The Court's announcement of the two-part test repeatedly refers to the "suit" and "lawsuit" in singular terms; furthermore, the opinion imposes no requirement of multiple suits. See *Professional Real Estate Investors*, 113 S. Ct. at 1928.

213. See, e.g., *Hufsmith v Weaver*, 817 F.2d 455, 459 (8th Cir. 1987) (requiring access barring or improper acts); *Affiliated Capital Corp. v City of Houston*, 735 F.2d 1555, 1567-68 (5th Cir. 1984) (en banc) (observing in dictum that sham exception involves denial of meaningful access to government entity), *cert. denied*, 474 U.S. 1053 (1986); *Miracle Mile Assocs. v City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980) ("[A]ccess-barring is the cornerstone to the sham exception." (quoting *Wilmore, Inc. v Eagan Real Estate, Inc.*, 454 F. Supp. 1124, 1134-35 (N.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1372 (2d Cir.), *cert. denied*, 439 U.S. 983 (1978))); *Marquette Nat'l Bank*, 482 F. Supp. at 520-21 (requiring either access barring or ethical misconduct); see also *Handgards, Inc. v Ethicon, Inc.*, 601 F.2d 986, 998 (9th Cir. 1979) (Kennedy, J., concurring) ("*Franchise Realty* might be interpreted to require that the defendant's conduct was designed to cause competitive injury by exacting such extraordinary costs that meaningful use of an agency or tribunal was barred"), *cert. denied*, 444 U.S. 1025 (1980); *Franchise Realty Interstate Corp. v San Francisco Local Joint Executive Bd.*, 542 F.2d 1076, 1080-81 (9th Cir. 1976) (arguably implying that plaintiff must show access barring), *cert. denied*, 430 U.S. 940 (1977). Commentators have questioned these decisions. See Hurwitz, *supra* note 15, at 101-02 & n.163 (citing commentators); Myers, *supra* note 15, at 610-11 (observing that access barring should not be required); see also Balmer, *supra* note 203, at 47-48 (persuasively arguing that later Supreme Court decisions reject requirement that antitrust plaintiff show access barring).

214. Justice Thomas mentioned "access barring" in his historical discussion of *California Motor Transport*, but did not include it in the two-part test for sham litigation. See *Professional Real Estate Investors*, 113 S. Ct. at 1927-29.

filed, that fraudulent conduct was involved, or that access barring took place. On the other hand, the meaning of the Court's objective standard remains unclear, particularly on the issue of whether the underlying litigation must be frivolous to constitute a sham. Finally, the contours of the fraud exception to *Noerr-Pennington* remain unclear.

V Ramifications Beyond Antitrust Law

A. The First Amendment Right to Petition

The right to petition the government for redress of grievances is expressly protected in the Petition Clause of the First Amendment of the United States Constitution.²¹⁵ Historical antecedents of the Petition Clause can be found in the Magna Carta and the Declaration of Independence.²¹⁶ In 1875, the Supreme Court discussed the Petition Clause in *United States v Cruikshank*²¹⁷ and stated that "[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."²¹⁸ Justice Black described the right as "among the most precious of the liberties safeguarded by the Bill of Rights"²¹⁹ and later as a "fundamental right."²²⁰

One of the landmark cases in this area is *NAACP v Button*,²²¹ which held that the freedoms of association and speech, and the concomitant right to petition the courts, are constitutionally guaranteed under the First and Fourteenth Amendments.²²² Although *NAACP v Button* involved the NAACP's political action through the mechanism of the courts, later decisions recognized that the right to petition extends to those who act for

215. U.S. CONST. amend. I.

216. See Christina M. Spitzer, Note, *The Sham Exception to the Noerr-Pennington Doctrine*, 11 HASTINGS CONST. L.Q. 329, 332 n.25 (1984) (quoting historical references to petitioning rights from Magna Carta and Declaration of Independence).

217. 92 U.S. 542 (1875).

218. *United States v Cruikshank*, 92 U.S. 542, 552 (1875).

219. *United Mine Workers v Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

220. *United Transp. Union v State Bar*, 401 U.S. 576, 585 (1971).

221. 371 U.S. 415 (1963).

222. See *NAACP v Button*, 371 U.S. 415, 430-31 (1963) (holding unconstitutional Virginia statute barring attorney solicitation of clients).

economic reasons as well.²²³ As stated in *Thomas v Collins*,²²⁴ "[t]he grievances for redress of which the right to petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest."²²⁵

Noerr identifies two values furthered by the right to petition. The first focuses on securing the citizenry's need to present grievances to the government, and the second highlights the government's need for information from interested parties in order to ensure informed decision making.²²⁶ In many ways, these values are analogous to the free speech interests of the speaker to present information and of the audience to receive it.²²⁷ Moreover, the right to petition is closely linked to the right of association because parties are often more effective in petitioning as a group rather than individually. In fact, the right of association (in order to petition the government) was principally at stake in *NAACP v. Button*.²²⁸ Similarly, *California Motor Transport* discussed protection for litigation

223. See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (holding that trucking firms' litigation against competitors was protected under Petition Clause unless it constituted sham); *United Transp. Union*, 401 U.S. at 584-86 (holding that union members have right of access to courts); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 4-7 (1964) (holding that First Amendment's guarantees of free speech, petition, and assembly give railroad workers right to litigate personal injury claims through union-recommended attorney).

224. 323 U.S. 516 (1945).

225. *Thomas v Collins*, 323 U.S. 516, 531 (1945).

226. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961); see also *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) ("The first amendment interests involved in private litigation—compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts—are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims." (quoting Balmer, *supra* note 203, at 60)); Fischel, *supra* note 203, at 98 (discussing values underpinning right to petition). Daniel R. Fischel's article insightfully analyzes the immunity cases and anticipates the result in *Professional Real Estate Investors*. See *id.* at 105-06 ("[V]aluable speech is not deprived of first amendment protection by the speaker's improper motive."). Fischel argues that immunity should extend to legitimate petitioning, regardless of motive. *Id.* at 106.

227. See *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-9 (1970). See generally Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

228. See *NAACP v. Button*, 371 U.S. 415, 430-31 (1963); Fischel, *supra* note 203, at 97

under the "rights of association and of petition" in tandem because the trucking firms in that case had joined together to assert their claims.²²⁹

There is sparse commentary on the right to petition generally or the right of access to the courts in particular. Daniel R. Fischel describes the right of access to the courts (as opposed to the legislative and executive branches) as "long shrouded in uncertainty."²³⁰ Edmund G. Brown has noted that "the legal limits of 'proper' petitioning are unclear, and there are some doubts even as to basic principles."²³¹ Of the few cases interpreting the right to litigate, most specifically deal with the due process rights of indigent prisoners seeking access to the courts.²³²

Before *Professional Real Estate Investors*, the Supreme Court's last and most direct treatment of the Petition Clause was in *McDonald v. Smith*.²³³ In that case, the defendant sent the President and others defamatory letters about the plaintiff, who was under consideration for a post as United States Attorney.²³⁴ After the plaintiff failed to get the nomination, he sued for defamation.²³⁵ The defendant asserted that the

229. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511-12 (1972).

230. Fischel, *supra* note 203, at 97 n.99. For additional commentary, see generally Norman B. Smith, "Shall Make No Law Abridging . . . An Analysis of the Neglected, but Nearly Absolute, Right of Petition," 54 U. CIN. L. REV. 1153 (1986) (presenting overview of Petition Clause and criticism of Supreme Court's narrow reading of it in *McDonald v. Smith*, 472 U.S. 479 (1985)); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986) (presenting historical overview of right to petition); Robert A. Zauzmer, Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243 (1984) (arguing that "absolute" petitioning immunity should not be applied outside antitrust field and anticipating result in *McDonald v. Smith*). See also Lee A. Strimbeck, Note, *The Right to Petition*, 55 W. VA. L. REV. 275, 276 (1953) ("The paucity of holdings directly founded on this right led Mr. Justice Story to describe it with meaningless verbiage and Mr. Cooley to state, 'Happily the occasions for discussing and defending it have not been numerous in this country'" (footnote omitted)).

231. Edmund G. Brown, *The Right to Petition: Political or Legal Freedom?*, 8 UCLA L. REV. 729, 731 (1961).

232. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 578-80 (1974) (discussing prisoner's right of access to courts under Due Process Clause). See generally *Bounds v. Smith*, 430 U.S. 817 (1977); *Johnson v. Avery*, 393 U.S. 483 (1969); *Ex parte Hull*, 312 U.S. 546 (1941).

233. 472 U.S. 479 (1985).

234. See *McDonald v. Smith*, 472 U.S. 479, 480-81 (1985).

235. See *id.*

Petition Clause afforded him absolute immunity from liability for defamation.²³⁶

After recounting the history of the petitioning right, Chief Justice Burger noted that it was not absolute.²³⁷ He cited *California Motor Transport* and *Bill Johnson's Restaurants, Inc. v NLRB*²³⁸ for the proposition that the Petition Clause does not immunize baseless litigation.²³⁹ He then noted that liability can be imposed for defamatory statements, at least when a showing of intentional or reckless falsehood is made.²⁴⁰ This, of course, is the *New York Times Co. v Sullivan*²⁴¹ "actual malice" standard.²⁴² Chief Justice Burger then refused to apply absolute immunity to the defendant's statements, even though they were made in the form of petitions to the President and other political leaders.²⁴³ To do so "would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble."²⁴⁴ Thus, although the defendant would not be liable for defamation unless he acted with actual malice, *McDonald v Smith* refused to recognize an absolute privilege based on the Petition Clause.²⁴⁵

236. *Id.* at 481-82.

237. *See id.* at 482-85.

238. 461 U.S. 731 (1983). For further discussion of *Bill Johnson's Restaurants, Inc. v NLRB*, 461 U.S. 731 (1983), see *infra* notes 255-57 and accompanying text.

239. *McDonald*, 472 U.S. at 484 (citing *Bill Johnson's Restaurants*, 461 U.S. at 743, and *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)).

240. *See id.*

241. 376 U.S. 254 (1964).

242. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that defamatory statement regarding public officials is actionable only upon proof that it was made "with knowledge that it was false or with reckless disregard of whether it was false or not"). Presumably, the plaintiff in *McDonald*, as a would-be public official or a limited-purpose public figure, would be required to meet the actual malice standard.

243. *See McDonald*, 472 U.S. at 485.

244. *Id.* Chief Justice Burger continued: "These First Amendment rights are inseparable, and there is no sound basis for granting *greater* constitutional protection to statements made in a petition to the President than other First Amendment expressions." *Id.* (emphasis added) (citation omitted).

245. *See id.* For commentary on *McDonald v. Smith*, see Smith, *supra* note 230, at 1153 (arguing that Petition Clause should provide absolute immunity from defamation and criticizing *McDonald v. Smith*). *See also* Zauzmer, *supra* note 230, at 1245, 1265-71 (arguing that actual malice rule should apply to defamatory petitions and anticipating result in *McDonald v. Smith*).

McDonald v Smith confirms that petitioning immunity is an important constitutional doctrine, one that is coterminous with the other First Amendment protections. But the decision leaves open the question of the applicability of the Petition Clause to areas of law other than defamation. In defamation law, the Supreme Court has already struck a balance between the state and individual interests in protecting reputation, on the one hand, and the First Amendment-based need for a free press and free speech, on the other hand. *New York Times v Sullivan* and its progeny have resolved those issues, and *McDonald v Smith* held that the Petition Clause does not change that balance. No similar constitutional balance has been struck with regard to the tort of abuse of process, Rule 11, or various other statutes and rules governing the conduct of litigation. *Professional Real Estate Investors* may provide some guidance on how that balance should be struck, as will be discussed below

B. Noerr-Pennington as a First Amendment Doctrine

The Supreme Court's opinions in *Noerr* and *Pennington*, as well as their progeny, indisputably have a constitutional component. In *Noerr*, the Court explicitly referred to the First Amendment concerns that would arise if the Sherman Act penalized legitimate petitioning activity:

The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.²⁴⁶

In essence, the Court in *Noerr* employed a standard canon of statutory construction by avoiding constitutional considerations through a narrow interpretation of the Sherman Act.²⁴⁷

To the extent there was any doubt about the constitutional grounding for *Noerr-Pennington* immunity, the Supreme Court explicitly acknowledged its First Amendment basis in *California Motor Transport*.²⁴⁸ In that

246. *Eastern R.R. Presidents Conference v Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961).

247. See *infra* note 305 and accompanying text.

248. See *California Motor Transp. Co. v Trucking Unlimited*, 404 U.S. 508, 510-12 (1972).

case, the Court held that "it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view."²⁴⁹

Similarly, in *Professional Real Estate Investors* itself, Justice Thomas repeatedly referred to the First Amendment interests at stake in the case and the need to avoid infringing upon the right to petition.²⁵⁰ Indeed, *Professional Real Estate Investors* specifically noted that the protective principles of *Noerr* have been invoked in other contexts: "[W]e have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham."²⁵¹ The opinion cited *NAACP v Claiborne Hardware Co.*²⁵² and *Bill Johnson's Restaurants, Inc. v NLRB*²⁵³ in support of this proposition.²⁵⁴

Bill Johnson's Restaurants is undoubtedly the broadest application of the *Noerr* principle. That case involved the issue of whether an "improperly motivated" lawsuit could be enjoined as an unfair labor practice under the National Labor Relations Act.²⁵⁵ Drawing a parallel to *Noerr* in the antitrust field, the Supreme Court held that no injunction could be granted unless the challenged litigation behavior was "baseless."²⁵⁶ This application of *Noerr* in the disparate field of labor law demonstrates its potentially broad reach. Moreover, Justice White's opinion in *Bill Johnson's Restaurants* treats *Noerr* and *California Motor Transport* as analytical benchmarks for the First Amendment, analogous to *New York Times* and its progeny. "Just as false statements are not immunized by the First Amendment right to freedom of speech, *baseless litigation* is not immunized by the First Amendment right to petition."²⁵⁷

Claiborne Hardware dealt with a civil suit challenging the NAACP's economic boycott of Mississippi businesses owned by whites.²⁵⁸ Noting that

249. *Id.* at 510-11.

250. See *Professional Real Estate Investors*, 113 S. Ct. at 1926-27 (referring to First Amendment right to petition).

251. *Id.* at 1927

252. 458 U.S. 886 (1982).

253. 461 U.S. 731 (1983).

254. See *Professional Real Estate Investors*, 113 S. Ct. at 1927

255. See *Bill Johnson's Restaurants, Inc. v NLRB*, 461 U.S. 731, 743-44 (1983).

256. See *id.*

257. *Id.* at 743 (emphasis added) (citations omitted).

258. See *NAACP v Claiborne Hardware Co.*, 458 U.S. 886, 888-90 (1982).

the NAACP and the other defendants were exercising rights of speech, assembly, association, and petition, Justice Stevens concluded for the Court that the defendants could not be liable under state antitrust or tort law for economic losses that the boycott caused.²⁵⁹ In discussing the defendants' First Amendment rights, the Court discussed *Noerr* extensively.²⁶⁰

The constitutional analysis developed in *Noerr*, *California Motor Transport*, and *Professional Real Estate Investors* establishes that the First Amendment right to petition constrains the types of litigation activities that can be penalized under the Sherman Act. There is no reason to believe, however, that these principles are limited to antitrust cases. Indeed, *Noerr-Pennington* has already been cited and its policies applied in other areas of the law, as demonstrated by *Bill Johnson's Restaurants*.

The effect of *Noerr-Pennington* outside the antitrust arena has received little attention. Although most commentators have discussed the First Amendment basis for the immunity in general terms,²⁶¹ they have not explored the broader scope of the *Noerr-Pennington* line of decisions. The one exception is a student note by Robert A. Zauzmer, written prior to *McDonald v Smith*.²⁶² Zauzmer argues that the Petition Clause does not provide absolute immunity from liability, particularly for defamation;²⁶³ the Supreme Court adopted this view in *McDonald v Smith* and invoked the actual malice rule applicable to defamation cases generally.²⁶⁴ Zauzmer posits that *Noerr-Pennington's* principles should not be applied outside the antitrust field, and he criticizes several cases that found absolute petitioning privileges in tortious interference, civil rights, libel, and malicious prosecution cases.²⁶⁵

259. See *id.* at 911-15.

260. See *id.* at 913-14. Justice Stevens distinguished the defendants in *Claiborne Hardware* from the railroad lobbyist defendants in *Noerr*: "Like the railroads in *Noerr*, the petitioners certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign. Unlike the railroads in that case, however, the purpose of petitioners' campaign was not to destroy legitimate competition." *Id.* at 914.

261. See Bien, *supra* note 15, at 44-46; Fischel, *supra* note 203, at 84 n.32, 88 (noting that later precedents indicate that *Noerr* resolved First Amendment issue); see also Balmer, *supra* note 203, at 56-62; cf. Milton Handler, *Twenty-Five Years of Antitrust*, 73 COLUM. L. REV. 415, 434-35 (1973) (arguing that *Noerr* did not reach constitutional issue); Zauzmer, *supra* note 230, at 1250 & n.33 (same).

262. Zauzmer, *supra* note 230.

263. See *id.* at 1248-49.

264. See *McDonald v Smith*, 472 U.S. 479, 485 (1985).

265. See Zauzmer, *supra* note 230, at 1256-59. Zauzmer cites a number of lower court

If there were ever any doubt, it is now clear—in light of *California Motor Transport*, *Bill Johnson's Restaurants*, *McDonald v. Smith*, and *Professional Real Estate Investors*—that the Petition Clause is not absolute. Rather, there must be a balancing between the right to petition and whatever countervailing interests are served by antitrust law or other bodies of law that may impinge on access to the courts. The difficult question is how that balance should be struck.

Because *Noerr-Pennington* has a constitutional pedigree, the Supreme Court's recent announcement of a two-part test for sham litigation should be analyzed to determine whether it has any applicability to other areas of the law. Presumably, the Court will find litigation behavior constitutionally protected unless the party attacking the behavior can show that the behavior is in some way illegitimate—that it constitutes sham litigation or is a fraud on the court. In *Professional Real Estate Investors*, the Court established a two-part test, requiring that the litigation behavior be both objectively unreasonable and improperly (anticompetitively) motivated.²⁶⁶ Leaving aside cases of fraud on the court (such as *Walker Process*), this new two-part test appears to be the stricture with which other areas of law must now comport. Using a categorical constitutional analysis, the *Professional Real Estate Investors* Court has provided guidelines under which Petition Clause claims can be evaluated. If the two-part test is met (or if fraud on the court is proven), then the litigation behavior can be penalized; if the test is not met, then the behavior is constitutionally protected. Given that this balance is suitable for antitrust cases, it should be the presumptive framework for evaluating other laws that constrain litigation behavior.

cases applying *Noerr-Pennington* broadly, including *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803, 817-18 (S.D.N.Y. 1979) (involving civil rights claim); *Sierra Club v. Butz*, 349 F. Supp. 934, 937-39 (N.D. Cal. 1972) (holding that claim of tortious interference with business advantage is barred by absolute privilege); *City of Long Beach v. Bozek*, 645 P.2d 137, 143 (Cal. 1982) (finding absolute privilege against malicious prosecution claim), *vacated*, 459 U.S. 1095, *reinstated*, 661 P.2d 1072 (Cal. 1983); *Webb v. Fury*, 282 S.E.2d 28, 36-37 (W. Va. 1981) (finding absolute privilege in libel case).

Contrary to Zauzmer's position, the Supreme Court clearly views *Noerr* as a general Petition Clause case. *Bill Johnson's Restaurants* establishes this point. See *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744 (1983) ("[Petition clause] [c]onsiderations led us in the antitrust context to adopt the 'mere sham' exception in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). We should follow a similar course under the NLRA."); cf. Zauzmer, *supra* note 230, at 1261 (presenting contrary interpretation of *Bill Johnson's Restaurants*).

266. See *Professional Real Estate Investors*, 113 S. Ct. at 1928.

C. Applying Professional Real Estate Investors *Beyond Antitrust Law*

1. Introduction

Even a brief review of the legal landscape reveals many fields in which common-law decisions, rules, and statutes apply a subjectively based standard for evaluating litigation behavior. This Article will examine three areas of law to illustrate the point: the common-law tort of abuse of process, Rule 11 of the Federal Rules of Civil Procedure, and the federal attorney bad faith statute (28 U.S.C. § 1927). Each of these laws condemns litigation brought for an improper or bad faith purpose, often regardless of whether the litigation is objectively without merit. Many other provisions of state and federal law share this focus on subjective intent. For example, Rules 16(f) and 26(g) of the Federal Rules of Civil Procedure permit the imposition of sanctions for bad faith discovery abuses.²⁶⁷ Bankruptcy Rule 9011 penalizes bad faith actions in bankruptcy proceedings.²⁶⁸ The Federal Rules of Appellate Procedure include broad disciplinary powers.²⁶⁹

267 FED. R. CIV P 16(f), 26(g). Rule 16(f) states in relevant part: "[I]f a party or party's attorney fails to participate [in a pretrial conference] *in good faith*, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just

✓ " FED. R. CIV P 16(f) (emphasis added). Rule 26(g) states in relevant part:

The signature of an attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is *not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation*

FED. R. CIV P 26(g)(2)(B) (emphasis added). This language is particularly similar to the subjective good faith prong of Rule 11. Cf. FED. R. CIV P 37(b)(2) (imposing discovery sanctions when party's actions are not "substantially justified").

268. BANKR. R. 9011. Bankruptcy Rule 9011 states in relevant part:

The signature of an attorney or a party constitutes a certificate that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry [the petition, pleading, motion, and other paper] is *not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case*.

BANKR. R. 9011(a) (emphasis added).

269. See FED. R. APP P 46(c). Rule 46(c) of the Federal Rules of Appellate Procedure states:

A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for *conduct*

In addition to state law counterparts to these federal rules, some states have statutory or common-law doctrines that permit the award of litigation expenses when a party acts in bad faith. For example, Georgia law provides:

The expenses of litigation generally shall not be allowed as part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has *acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expenses*, the jury may allow them.²⁷⁰

Finally, many provisions of federal and state law impose *automatic* (or nearly automatic) fee-shifting for prevailing parties.²⁷¹ In theory, these statutes are subject to challenge on the ground that they may "chill" advocacy. Indeed, they can be viewed as a form of strict liability because the prevailing party recovers attorneys' fees and other litigation costs regardless of the merit of the losing party's position. In *Gertz v Robert*

unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

FED. R. APP. P. 46(c) (emphasis added); *cf.* FED. R. APP. P. 38 (permitting sanctions only for frivolous appeals). United States Supreme Court Rule 42.2 permits the recovery of damages and single or double costs only if "a writ of certiorari, an appeal, or application for other relief is frivolous." SUP. CT. R. 42.2.

270. GA. CODE ANN. § 13-6-11 (1981) (emphasis added). The plaintiff need only establish one of these three prongs to seek litigation expenses. *See* National Serv. Indus. v. Hartford Accident & Indem. Co., 661 F.2d 458, 463 (5th Cir. 1981). *See generally* ADP-Financial Computer Servs. v. First Nat'l Bank, 703 F.2d 1261 (11th Cir. 1983); Jones v. Spindel, 235 S.E.2d 486 (Ga. 1977). Although this provision only applies to plaintiffs and partly deals with conduct outside the litigation itself, some applications of the statute would raise Petition Clause concerns.

Another common-law claim is tortious interference with business relations. *See* Badger Cab Co. v. Soule, 492 N.W.2d 375, 380 (Wis. Ct. App. 1992) (discussing claim and citing other cases).

271. *See, e.g.,* Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1033 & n.19 (1994) (holding that prevailing parties need not prove either bad faith or frivolousness to recover attorneys' fees under § 505 of Copyright Act of 1976). Many attorneys' fees statutes involve variations on the "English rule" of automatic awards of attorneys' fees to prevailing parties. *See* 5 U.S.C. § 504 (1988) (providing that under Equal Access to Justice Act, plaintiff can recover attorneys' fees unless opponent's position is substantially justified); 42 U.S.C. § 2000e-5(k) (1988) (awarding fees to prevailing plaintiffs, but allowing prevailing defendants to recover only if claim is unreasonable or frivolous); *see also* 5 U.S.C. § 552 (1988) (Freedom of Information Act); 42 U.S.C. § 1988 (1988) (Civil Rights Attorney's Fees Awards Act).

Welch, Inc.,²⁷² a defamation case, the Court held that the First Amendment prohibits the imposition of strict liability, at least upon speech regarding matters of public concern.²⁷³ Nonetheless, there are other considerations in these cases, such as the compelling or strong interests furthered by the particular statutory scheme. Further, because these fee-shifting statutes reward prevailing parties, their effect on the incentive to litigate is ambiguous.²⁷⁴ Finally, some fee-shifting statutes only permit prevailing plaintiffs to recover their fees,²⁷⁵ which also complicates the analysis. A complete analysis of this topic is beyond the scope of this Article.

2. *The Tort of Abuse of Process*

Under the common law, two tort actions are available for the misuse of the adjudicatory process: abuse of process and malicious prosecution. These torts differ in terms of their elements and available defenses. The tort of malicious prosecution generally requires proof of four elements: (1) the institution of civil or criminal proceedings against the plaintiff, (2) the termination of the proceedings in favor of the plaintiff, (3) the absence of probable cause to institute the proceedings, and (4) the presence of "malice" or bad faith.²⁷⁶

Abuse of process, on the other hand, does not require proof that the legal process was invoked without probable cause. The two elements of this tort are the presence of an ulterior purpose and an overt act that is not proper in the ordinary course of a proceeding.²⁷⁷ As Prosser and Keeton note, this tort "provide[s] a remedy for a group of cases in which legal procedure has been set in motion in proper form, *with probable cause, and even with ultimate success*, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed."²⁷⁸

272. 418 U.S. 323 (1974). The *Gertz* rule applies to private figure plaintiffs, who are not required to prove actual malice. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974).

273. See *id.* at 347-48 & n.10.

274. For citations to commentary on the effect of fee-shifting statutes, see Richard L. Schmalbeck & Gary Myers, *A Policy Analysis of Fee-Shifting Rules Under the Internal Revenue Code*, 1986 DUKE L.J. 970, 974-79 & n.18.

275. See *supra* note 271.

276. See PROSSER & KEETON, *supra* note 165, § 119, at 871. Some jurisdictions require a showing of special damages as an element of a malicious prosecution claim involving civil (but not criminal) proceedings. See *id.* § 120, at 889.

277. See *id.* § 121, at 898.

278. *Id.* at 897 (emphasis added).

The essence of abuse of process is the actor's unlawful purpose in utilizing the machinery of the courts: "The purpose for which the process is used, once it is issued, is the only thing of importance."²⁷⁹ In the classic English case, *Grainger v Hill*,²⁸⁰ the defendant had the plaintiff arrested for a collateral purpose.²⁸¹ The arrest was intended to coerce the plaintiff, a ship's captain and owner, to surrender the register of his vessel.²⁸² The defendant argued that the plaintiff could show neither that the proceeding had terminated in his favor nor that it was baseless.²⁸³ In response, the court held:

[T]his is an action for abusing the process of law, by applying it to extort property from the Plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved.²⁸⁴

Modern American cases follow the same principle by recognizing the absence of a requirement that the underlying proceeding lack probable cause.²⁸⁵ Indeed, there is even some precedent for the view that an abuse of process claim cannot be brought if the underlying action was frivolous.²⁸⁶

279. *Id.*

280. 132 Eng. Rep. 769 (C.P. 1838).

281. *See Grainger v Hill*, 132 Eng. Rep. 769, 772 (C.P. 1838).

282. *See id.*

283. *See id.* at 773.

284. *Id.*

285. *See PROSSER & KEETON*, *supra* note 165, § 121, at 897 & nn.4-5 (citing cases); *see also* *Warwick Dev. Co. v. GV Corp.*, 469 So. 2d 1270, 1274-75 (Ala. 1985) (involving use of unlawful detainer claim as retribution against lessee); *Board of Educ. v. Farmingdale Classroom Teachers Ass'n*, 343 N.E.2d 278, 283 (N.Y. 1975) (involving misuse of subpoena process during labor dispute); *Ginsberg v. Ginsberg*, 443 N.Y.S.2d 439, 441 (App. Div. 1981) (involving use of subpoena to harass wife and to exhaust her financial resources); *Badger Cab Co. v. Soule*, 492 N.W.2d 375, 380 (Wis. Ct. App. 1992) (holding that bad faith or lack of probable cause may establish abuse of process).

286. *See WILLIAM L. PROSSER ET AL.*, *CASES AND MATERIALS ON TORTS* 1022 (8th ed. 1988) (citing *Wells v. Orthwein*, 670 S.W.2d 529 (Mo. Ct. App. 1984), and *Martin v. Trevino*, 578 S.W.2d 763 (Tex. Civ. App. 1978)). A better view would permit both an abuse of process and a malicious prosecution claim to exist if a frivolous suit is brought for an improper purpose. As long as the plaintiff is not permitted a double recovery, there should be no bar to the assertion of both legal theories. *See Badger Cab Co.*, 492 N.W.2d at 381 (holding that abuse of process claim may be based on bad faith or lack of probable cause); *PROSSER & KEETON*, *supra* note 165, § 121, at 898 & nn.11-12 (noting that theories overlap and that both may be asserted in same action).

The tort of abuse of process as it is commonly interpreted does not withstand the scrutiny of *Professional Real Estate Investors*. Liability can hinge on a showing of subjective purpose, a result that the Petition Clause precludes. The tort's impact on petitioning rights can be severe because traditional tort remedies are potentially available, including damages for emotional distress and financial losses and possibly punitive damages.²⁸⁷ There is no reason to assume, moreover, that abuse of process serves some governmental interest that is more compelling than those served by the Sherman Act.²⁸⁸

3. Rule 11 of the Federal Rules of Civil Procedure

In its present form, Rule 11 of the Federal Rules of Civil Procedure requires attorneys or unrepresented parties to certify that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, [the pleading, motion, or other paper] is not being presented *for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.*"²⁸⁹ Although this discussion is limited to the federal Rule 11, many states have counterpart provisions identical or similar to the federal provision.²⁹⁰

287 See PROSSER & KEETON, *supra* note 165, § 121, at 899-900. Courts have recently applied *Professional Real Estate Investors* to common-law claims of malicious prosecution, tortious interference, breach of fiduciary duty, and abuse of process. See *Whelan v. Abell*, 827 F. Supp. 801, 801-04 (D.D.C. 1993) (Sporkin, J.), *dismissed*, 1993 WL 410900 (D.C. Cir. Oct. 6, 1993); see also *Matossian v. Fahmie*, 161 Cal. Rptr. 532, 535-38 (Ct. App. 1993) (applying Petition Clause to common-law claims); cf. *Zauzmer*, *supra* note 230, at 1256-59 (discussing cases applying *Noerr* outside antitrust context).

288. In *Northern Pacific Railway v. United States*, 356 U.S. 1 (1958), the Court stated: "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Id.* at 4. Similarly, in *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), the Court stated: "The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor." *Id.* at 359.

289. FED. R. CIV. P. 11(b)(1) (emphasis added). The attorney or unrepresented party must also satisfy three other prongs of the rule (as amended in 1993), which focus on a reasonable basis in law, a reasonable basis in fact for all allegations, and a reasonable basis in fact for all denials of factual contentions. See FED. R. CIV. P. 11(b)(2)-(4).

290. See GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* § 1, at 2 (2d ed. 1994). Because Rule 11 was amended in 1993, many state counterparts track the older language of the rule, which contained a subjective prong similar to that in the present rule. See FED. R. CIV. P. 11 (1988). In addition, several other federal rules

Case authorities and commentators are divided as to whether a Rule 11 violation can ever be established when the claim or motion has a factual and legal basis.²⁹¹ This disagreement has, until now, been a matter of interpreting Rule 11's language and policy. The better view, particularly given the language of Rule 11, is that sanctions can be assessed solely on the basis of a finding of bad faith.

Thus, there are several independent ways in which an attorney or party can violate Rule 11. An illustrative Eleventh Circuit case, *Didie v Howes*,²⁹² states that Rule 11 is violated if any of three types of conduct can be proven: the filing of a pleading (1) that has no reasonable basis in fact, (2) that is not based on existing law or a reasonable argument for changing current law, or (3) that is brought in bad faith or for an improper purpose.²⁹³ *Didie* and numerous other Rule 11 cases illustrate that the Rule includes both an objective prong (a reasonable basis in law and fact) and a separate subjective prong.²⁹⁴ In most circuits, Rule 11 sanctions can be levied based solely on a violation of the subjective bad faith portion of the Rule; in other words, an attorney or party can be sanctioned for meritorious but improperly motivated litigation activities.²⁹⁵ Thus, courts have fre-

include a similar subjective prong. See *supra* notes 267-69.

291. See *infra* note 295.

292. 988 F.2d 1097 (11th Cir. 1993).

293. See *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir. 1993).

294. See *id.*, see also *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988).

Rule 11 in its original form contained only a subjective prong; the objective prong was added as part of the 1983 amendments to the Rule. See JOSEPH, *supra* note 290, § 13, at 216 ("The improper purpose clause is a vestige of the original Rule 11, which generally required [a] finding of subjective bad faith before sanctions could be imposed. Although a finding of bad faith is no longer prerequisite to the imposition of a Rule 11 sanction, it will support a sanction under the improper purpose clause of the Rule." (citing *In re Yagman*, 796 F.2d 1165, 1186 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987))). Many post-1983 Rule 11 cases state that the governing standard is now an objective one. These statements, however, relate to the objective prongs of the rule. Parties threatened with sanctions under these objective prongs often seek to defend their actions as motivated by subjective good faith, an argument that the Supreme Court has rejected. See *Business Guides, Inc. v. Chromatic Communications Enters.*, 498 U.S. 533, 549 (1991) (applying objective prong of Rule 11).

295. See, e.g., *Pathe Computer Control Sys. Corp. v. Kinmont Indus., Inc.*, 955 F.2d 94, 96-97 (1st Cir. 1992) (finding that motion to transfer case at eleventh hour was brought for purposes of delay and warranted Rule 11 sanctions); *Bryant v. Brooklyn Barbeque Corp.*, 932 F.2d 697, 699 (8th Cir. 1991) (involving complaint filed to generate bad publicity), *cert. denied*, 112 S. Ct. 638 (1992); *Pelletier v. Zweifel*, 921 F.2d 1465, 1513-

quently sanctioned nonfrivolous litigation that was brought to harass, to cause unnecessary delay, or to increase litigation costs.²⁹⁶

22 (11th Cir.) (involving baseless suit brought for purposes of harassment), *cert. denied*, 112 S. Ct. 167 (1991); *Coats v. Pierre*, 890 F.2d 728, 734 (5th Cir.) (involving harassment through abusive language in pleadings), *cert. denied*, 498 U.S. 821 (1990); *see also* *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 831 (2d Cir. 1992); *Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1436 (7th Cir. 1987); *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1130 (5th Cir. 1987); *Cohen v. Virginia Elec. & Power Co.*, 788 F.2d 247, 248 (4th Cir. 1986). *But see* *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987) (expressing minority view that improper purpose is insufficient basis for Rule 11 violation).

For commentary on this issue, see JOSEPH, *supra* note 290, § 13(C). Gregory Joseph states:

There is a slight split among the Circuits as to whether sanctions may be imposed for the filing of a meritorious paper for an improper purpose. The prevailing, and better, view is that sanctions may be imposed in these circumstances, and it may be summarized as follows: Presenting a pleading, written motion or other paper for an improper purpose violates the Rule, even if the paper has ample evidentiary support and is warranted in law

Id. at 221; *see also* GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTIVE MEASURES § 4.01[b][1][G] (2d ed. Supp. 1993) (discussing conflicting authorities and citing cases awarding sanctions for well-grounded actions brought in bad faith). Georgene Vairo supports a position opposite that of Joseph. *See id.* § 4.01[b][1][G][ii], at 4-44 ("If there are legal and factual grounds for pursuing a claim, courts should stay out of the intrusive and time-consuming business of second-guessing a litigant's motives for pursuing the claim or motion."). *See generally* George C. Cochran, *Trouble on the Horizon: The Caseload Problem and the "F frivolous Appeal,"* 2 FIFTH CIRCUIT REP 249 (1985).

296. *See* *Pathe Computer Control Sys. Corp. v. Kinmont Indus., Inc.*, 955 F.2d 94, 96-97 (1st Cir. 1992) (finding that motion to transfer case at eleventh hour was brought for purposes of delay and warranted Rule 11 sanctions); *Bryant v. Brooklyn Barbeque Corp.*, 932 F.2d 697, 699 (8th Cir. 1991) (involving complaint filed to generate bad publicity), *cert. denied*, 112 S. Ct. 638 (1992); *Pelletier v. Zweifel*, 921 F.2d 1465, 1520 (11th Cir.) (involving RICO action brought for purposes of harassing defendant and obtaining quick settlement), *cert. denied*, 112 S. Ct. 167 (1991); *Coats v. Pierre*, 890 F.2d 728, 734 (5th Cir.) (involving harassment through abusive language in pleadings), *cert. denied*, 498 U.S. 821 (1990); *Harrison v. Edison Bros. Apparel Stores, Inc.*, 146 F.R.D. 142, 143-45 (M.D.N.C. 1993) (finding that last-minute motion to disqualify counsel was brought to harass, delay, and needlessly increase cost of litigation); *Novak v. National Broadcasting Co.*, 779 F. Supp. 1428, 1428 (S.D.N.Y. 1992) (finding that although litigation had some merit, pleading with repeated references to opposing counsel as "Laurel and Hardy" was subject to sanctions as intended to harass); *Lelsz v. Kavanagh*, 137 F.R.D. 646, 648-55 (N.D. Tex. 1991) (involving last-minute, bad faith motions); *Ballentine v. Taco Bell Corp.*, 135 F.R.D. 117, 121-23 (E.D.N.C. 1991) (finding that Rule 11 sanctions was appropriate in case in which plaintiff brought suit for dual purposes of obtaining relief and harassing his

The subjective prong of Rule 11 is thus analogous to the common-law tort of abuse of process, just as the Rule's objective prong is similar to a malicious prosecution claim.²⁹⁷ Although courts are careful to impose sanctions only in unusual circumstances and generally require objective evidence that the motion or pleading was brought for improper purposes,²⁹⁸ it is still quite possible for an attorney or party to be sanctioned despite having a well-grounded pleading or motion. In this respect, Rule 11—like the tort of abuse of process—is inconsistent with the command in *Professional Real Estate Investors* that litigation activity must first be objectively unreasonable before it can be sanctioned.²⁹⁹ Accordingly, Rule 11's subjective prong potentially violates the First Amendment Petition Clause, as it has been interpreted in *Professional Real Estate Investors*.

As in the case of abuse of process, there does not appear to be any way to distinguish Rule 11 from the antitrust laws. Rule 11's potential infringement of petitioning rights is as serious as the effect of an antitrust suit. In fact, the impact of Rule 11 on the right to petition is arguably more severe, given the number and gravity of Rule 11 motions.³⁰⁰ Furthermore, the governmental interests served by Rule 11—although strong—are of no greater weight than those interests furthered by federal antitrust law. Rule 11 serves several laudable purposes, as the Supreme Court stated in *Cooter & Gell v Hartmarx Corp.*:³⁰¹ "It is now clear that the central purpose of Rule 11 is to deter baseless filings in the district courts and thus streamline the administration and procedure of the federal courts."³⁰²

former manager); *Katz v Looney*, 733 F. Supp. 1284, 1287-88 (W.D. Ark. 1990) (involving complaint that alleged that law school dean "is totally inept, totally incompetent, and is not even familiar with the Federal Rules of Civil Procedure even though he is supposedly licensed to practice law and is supposedly the Dean of the law school").

297. See *Szabo Food Serv.*, 823 F.2d at 1083.

298. See JOSEPH, *supra* note 290, § 13(C), at 222 (discussing cases).

299. See *Professional Real Estate Investors*, 113 S. Ct. at 1928.

300. As of 1994, there are over 7,000 reported decisions regarding Rule 11, and no doubt many other instances are unreported. JOSEPH, *supra* note 290, at xxiii. For discussion of the types of sanctions available, see *id.* § 16.

301. 496 U.S. 384 (1990).

302. *Cooter & Gell v Hartmarx Corp.*, 496 U.S. 384, 393 (1990); see also *Business Guides, Inc. v Chromatic Communications Enters.*, 498 U.S. 533, 542 (1991) ("Rule 11 is aimed at curbing abuses of the judicial system." (quoting *Cooter & Gell*, 496 U.S. at 397)); cf. FED. R. CIV. P. 11 advisory committee notes (1993 amendments) ("[T]he purpose of Rule 11 sanctions is to deter rather than to compensate").

There is no reason to assume that these legitimate state interests are stronger than the procompetitive and proconsumer goals of the Sherman Act. The imposition of liability for harassing, delaying, or cost-increasing behavior under Rule 11 is laudable, but so is liability for misusing litigation to achieve anticompetitive ends. In fact, the very same behavior that forms the basis for an antitrust violation could also run afoul of Rule 11—such as the filing of a motion or pleading used to impose litigation costs on a marketplace rival. Nor is there any reason to believe that Rule 11 interests are more directly served than are antitrust interests.

As a result of *Professional Real Estate Investors*, the debate regarding the subjective prong of Rule 11 assumes a constitutional dimension. One way to resolve this First Amendment concern is to interpret Rule 11 narrowly by permitting sanctions for bad faith behavior only if there is also evidence of unreasonable litigation tactics. In essence, this approach would adopt the two-part test of *Professional Real Estate Investors*, requiring a finding of unreasonableness as well as bad faith.³⁰³ This approach would also pay homage to the view, expressed in *Noerr*, that statutes (such as the Sherman Act) and thus also rules (such as Rule 11) should be interpreted in their constitutional context and that any conflict with constitutional provisions should be avoided if possible.³⁰⁴ By using this familiar canon of statutory interpretation,³⁰⁵ the Petition Clause challenge to Rule 11 would be averted completely.

The difficulty with this course is that it is inconsistent with existing Rule 11 precedent in many circuits and, more fundamentally, with the language of the Rule itself. Rule 11 seems to contemplate the imposition of sanctions for bad faith behavior, regardless of the substantive merit of the claim or motion. Thus, every such sanction is now subject to constitutional challenge in light of *Professional Real Estate Investors*.

4. *The Federal Attorney Bad Faith Statute*

Enacted in 1948, 28 U.S.C. § 1927 provides a statutory remedy for bad faith actions by attorneys. The statute provides as follows:

303. See *Professional Real Estate Investors*, 113 S. Ct. at 1928.

304. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-38 (1961).

305. For general commentary on this rule of statutory interpretation, see 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 45.11, at 48-49 & nn.4 & 14-17 (5th ed. 1992) (discussing rule and citing cases).

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess cost, expenses, and attorneys' fees reasonably incurred because of such conduct.³⁰⁶

A violation of § 1927 can be based on a finding of improper purpose. In *McMahon v Shearson/American Express, Inc.*,³⁰⁷ for example, the court focused on whether a litigant's resort to state court was in bad faith for purposes of § 1927, as opposed to whether it was objectively reasonable under, for example, Rule 11's objective prong.³⁰⁸

A violation of § 1927 requires more than a showing of a frivolous or improvidently brought suit.³⁰⁹ Indeed, the promulgation of Rule 11 was in part a response to restrictive judicial interpretations of the scope of § 1927.³¹⁰ Some courts have held that a violation of § 1927 cannot be established unless the pleading or motion lacks a plausible factual or legal basis.³¹¹ This interpretation of § 1927 would comport with *Professional Real Estate Investors*'s requirement of objective unreasonableness as a condition precedent to liability for litigation behavior.³¹²

Other cases interpreting § 1927, however, focus on its requirement of subjective bad faith or recklessness. For example, in *United States v Associated Convalescent Enterprises, Inc.*,³¹³ an attorney was named on the opposing party's witness list.³¹⁴ The attorney filed a last-minute motion to

306. 28 U.S.C. § 1927 (1988). For commentary on this statute, see generally Dan B. Dobbs, *Awarding Attorneys Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435; Janet E. Josselyn, Note, *Song of the Sirens—Sanctioning Lawyers Under 28 U.S.C.A. § 1927*, 31 B.C. L. REV. 477 (1990). The purpose of the statute is to deter intentional and unnecessary delaying tactics. See *Beatrice Foods Co. v. New Eng. Printing & Lithographing Co.*, 899 F.2d 1171, 1177 (Fed. Cir. 1990).

307. 896 F.2d 17 (2d Cir. 1990).

308. See *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 23-24 (2d Cir. 1990). The *McMahon* court ultimately found that the litigant had not acted in bad faith, but noted that the opposing party may have "unreasonably and vexatiously multiplied these proceedings." *Id.* at 24.

309. See generally *Dreiling v. Peugeot Motors of Am., Inc.*, 850 F.2d 1373 (10th Cir. 1988).

310. See *VAIRO*, *supra* note 295, § 1.02, at 1-7.

311. See *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226-27 (7th Cir. 1984) (citing other decisions).

312. See *Professional Real Estate Investors*, 113 S. Ct. at 1928.

313. 766 F.2d 1342 (9th Cir. 1985).

314. *United States v. Associated Convalescent Enters., Inc.*, 766 F.2d 1342, 1344 (9th

prohibit the opposing party from calling him as a witness or, in the alternative, to continue the trial and to disqualify him as counsel.³¹⁵ The court granted the continuance and disqualified the attorney, but then sanctioned the attorney under § 1927 for delaying the proceedings.³¹⁶ The Ninth Circuit, noting that recklessness or bad faith is the keystone for § 1927 liability, upheld the sanction and concluded that the attorney had acted in a "calculated" manner.³¹⁷ Significantly for the purposes of *Professional Real Estate Investors*, there was no discussion of the objective merit of the attorney's last-minute motion; in fact, the district court granted the attorney's motion in part.³¹⁸ The focus under § 1927, as in abuse of process and Rule 11 cases, is on the use of a legitimate litigation strategy for an improper purpose.

Accordingly, whether § 1927 law is affected by the Supreme Court's ruling in *Professional Real Estate Investors* depends upon whether the statute includes a requirement of unreasonable conduct. The language of § 1927 refers to conduct that multiplies the proceeding "unreasonably and vexatiously."³¹⁹ If courts hew to the wording of the statute, then it should survive a First Amendment Petition Clause challenge. Certainly, the right to petition argument should be used as a guide to interpreting the statute, as has been the tradition in the Sherman Act area.

VI. Conclusion

The Supreme Court's decision in *Professional Real Estate Investors* will have important implications for antitrust law and for all other state

Cir. 1985).

315. *See id.*

316. *See id.*

317. *See id.* at 1346-47; *cf.* *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983) (applying bad faith or recklessness standard).

318. *See Associated Convalescent*, 766 F.2d at 1344.

319. 28 U.S.C. § 1927 (1988). Another statute that may require narrow interpretation is 28 U.S.C. § 1912 (1988). This provision, which has received little scholarly review, states as follows: "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court *in its discretion* may adjudge to the prevailing party just damages for his delay, and single or double costs." *Id.* (emphasis added). *See generally* Laura B. Bartell, *Taxation of Costs and Awards of Expenses in Federal Court*, 101 F.R.D. 553 (1984). For an example of a broad reading of this statute, see *Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154, 1161 (5th Cir. 1985) (holding that award of sanctions under § 1912 requires showing of unreasonableness or lack of reasonable good faith belief in appeal and citing other cases).

and federal laws regulating the conduct of litigation. It is now clear that *Noerr-Pennington* immunity for petitioning activity is a constitutionally based doctrine. The First Amendment Petition Clause protects litigation behavior from antitrust scrutiny unless the antitrust plaintiff can prove both elements of a two-part test: "[T]he lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and the lawsuit must be brought for anticompetitive purposes.³²⁰

The effect of this decision for antitrust law purposes is troubling. Particularly if it is interpreted to require a showing of baseless or frivolous litigation, *Professional Real Estate Investors* will permit some predatory litigation strategies to avoid antitrust scrutiny. Claims with some tenuous factual and legal plausibility that would not have been brought—but for their predatory effect—will now be immunized.

More significantly, *Professional Real Estate Investors* will require reevaluation of an array of state and federal law governing litigation behavior. The decision's condemnation of standards based solely on "improper purpose" has a constitutional dimension. The decision may thus bar claims under the common law, such as the tort of abuse of process. It can affect a panoply of federal statutes and rules that govern litigation practices, such as Rule 11 and 28 U.S.C. § 1927. And it can alter the counterpart rules and statutes adopted in many states.

Professional Real Estate Investors discourages the imposition of penalties for litigation behavior unless the litigation first fails to satisfy objective indicia of unreasonableness. Many federal and state law remedies for litigation abuse focus, however, on subjective bad faith as the sole benchmark for sanctions. Unless *Professional Real Estate Investors* can be distinguished in some way, these areas of law must justify their departure from the new rule in the antitrust area. The common-law, statutory, and rule-based sanctions for litigation behavior have at least as much impact on petitioning activity as the imposition of antitrust liability. Indeed, the lack of *Noerr-Pennington* immunity does not establish a substantive antitrust violation; the plaintiff must still prove the elements of a particular antitrust violation—such as monopolization—and prove damages causally linked to the violation.³²¹ Under the tort of abuse of process, Rule 11, § 1927, and various other litigation sanctions, the

320. *Professional Real Estate Investors*, 113 S. Ct. at 1928.

321. *See id.*

improperly motivated litigation activity can itself establish liability and leave only the issue of damages for resolution. Rule 11 in particular is a commonly used and often devastating attack on the right to litigate grievances.

Given that the potential infringement on petitioning rights is at least as great in these other areas of law, the next inquiry should be whether these areas of law protect interests that are stronger than those advanced by the Sherman Act. Again, there appears to be no principled basis on which to argue that the tort of abuse of process, Rule 11, or § 1927 furthers such an interest. The interests that these laws promote, such as deterring litigation abuse, are at best comparable to the interests furthered by the Sherman Act.

In short, once *Professional Real Estate Investors* is accorded its deserved status as a constitutional law decision, its impact on a wide array of other laws regulating litigation is indisputable. This result leaves two courses of action. Either each of these areas of law should be reassessed in order to accord with the requirement of objective unreasonableness in *Professional Real Estate Investors*, or the merit of this requirement should be reevaluated.

There is some argument for the broad application of *Professional Real Estate Investors* to other areas of law. Perhaps the imposition of sanctions or tort liability for well-grounded litigation should be stopped. It may tend to chill legitimate petitioning because parties with well-grounded claims may be liable for sanctions if they act for improper purposes, such as to harass or delay. Disputes regarding these subjective purposes may also increase the amount of satellite litigation and thereby burden the courts with litigation about litigation. On the other hand, the potentially far-reaching effects of *Professional Real Estate Investors* may be a reason to challenge its underlying assumption that litigation over "purpose" is necessarily undesirable. The decision may permit parties to use the adjudicatory process to achieve anticompetitive, abusive, or other improper goals. Given its broadest reach, it can also undercut a wide panoply of statutory and common-law remedies for misuse of litigation.

Courts or legislatures can modify some litigation rules to comport with the Petition Clause. For example, § 1927 could easily be interpreted to include a showing of unreasonable as well as ill-motivated conduct. The tort of abuse of process can be modified by common-law courts to include unreasonable conduct as an additional requisite to liability. Finally, in the case of Rule 11, the federal courts could interpret the

subjective prong of the Rule to include a showing of unreasonable conduct, although this interpretation strains the plain meaning of the Rule. A full resolution of this issue is beyond the scope of this Article, but it is clear that courts will need to address the problem in the wake of *Professional Real Estate Investors*.

